

THE HISTORY OF THE LAW OF PRIMOGENITURE

Tagore Law Lectures, 1925

THE HISTORY OF THE LAW OF PRIMOGENITURE

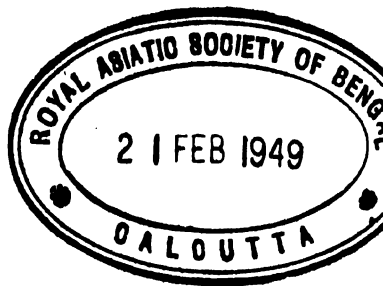
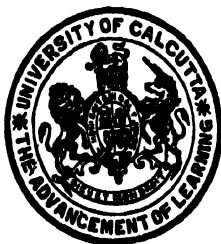
WITH SPECIAL REFERENCE TO INDIA,
ANCIENT AND MODERN.

BY

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Post-Vedic Times up to the Institutes of Manu"

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PREFACE

These lectures are printed as they were delivered at the University of Calcutta in 1926, with addition of some notes on cases decided since then. An attempt has been made in the following pages to trace the origin and growth of Primogeniture in various countries. So far as its history in Europe is concerned, I do not pretend to any originality in the views set forth in this volume, as will be apparent from the numerous references in the foot-notes, though I was frequently obliged to choose my way between conflicting theories and arguments, and to collect the scattered rays of light from various sources. But while dealing with the history of the subject in India, I must confess, I had not much light to lead me on. An endeavour however has been made to present as clearly as possible the leading facts of this most interesting subject. My readers will perceive for themselves whether or not any unity of the history can be established from these facts.

My thanks are due to Mr. Benoyendra Prosad Bagchi, M.A., B.L., Advocate, Calcutta High Court, for many valuable suggestions. I also take this opportunity to express my deep obligation to Mr. Bhupendranath Dutt Roy, M.A., B.L., Mr. Jyotirindra Das, B.L., Advocates, Calcutta High Court, and Mr. Upendranath Pal, B.L., Pleader, Alipore Judge's Court, for the pains they have taken in preparing the index and the table of cases.

My thanks are also due to the authorities of the Calcutta University Press for the pains they have taken in trying to

bring out the book free from printing mistakes; and I am specially grateful to the proof-readers of the Press, for they have not merely performed their duties carefully but have also materially helped me by suggesting clarification of certain complicated sentences and paragraphs.

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RADHABINOD PAL

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THE HISTORY OF THE LAW OF PRIMOGENITURE

INTRODUCTION.

Philosophers teach us that "the nature of things is nothing but their origin in certain times and certain forms, and as times and forms are, so and not otherwise are things born."¹ The necessity which shall be held responsible for their birth is only relative to certain times and certain forms, very different from the abstract, purely absolute, logical necessity. "The true nature of things accordingly is shewn only in motion and evolution, and does not lie in quiescent essences, placed beyond the sphere of phenomena."² Our present institutions, like all other phenomena, did not come to us in a day but are the result and expression of the accumulated experience of ages. Every institution presupposes a development which, as a rule, goes back to a distant past; and that which we to-day regard as natural and original, had a definite origin and assumed their present character as the outcome of many changes. It is not therefore possible even with the most discriminating care to describe a completed institution and convey at the same time an absolutely correct impression. The whole history of its origin and growth must be revealed before

Philosophy of the nature of things.

Every institution is the result and expression of the accumulated experience of ages.

Necessity for the historical study of the institution.

¹ Miraglia, Comparative Legal Philosophy, p. 92.

² Miraglia, 92.

we can hope to recognize its true character. There always shall be, in such institutions limbs, unknown and unknowable, yet with faint traces which must be found out and recognised before we can determine their genus and define their species. No mere dissection can help us in the matter. No mere analysis can guide us in our confusion and we must seek relief to our perplexity historically by tracing their origin.¹

Every theory indeed should begin at a time when the matter of which it treats begins. The true object of science is to determine the nature of beings, and this lies in their genesis.

But where are we to begin the history of the institution of Primogeniture? In an essay entitled "The Law and Custom of Primogeniture" by the Hon'ble George C. Brodrick we meet with the following passage: "We may assume with as much confidence as possible in enquiries of this nature

Origin of Primogeniture—where to seek.

The Hon'ble George C. Brodrick's view. that primogeniture is essentially a feudal institution. It cannot be traced back to any age preceding feudalism; it is fully established in those countries and those only, which are known to have adopted the feudal system; and it has been abandoned, for the most part, by those countries which have undergone a complete de-feudalising process."² On the other hand Prof. Maitland³

Prof. Maitland's indignant remarks.

is indignant at the very suggestion of the feudal origin of the institution. "It seems to be thought," he says, "that a vague reference to feudalism is a sufficient account of the origin of Primogeniture. Perhaps familiarity with this law has blunted our

¹ "It is a natural resource," says DeQuincey, "that whatsoever we find it difficult to investigate as a result, we endeavour to follow as a growth."

² Systems of Land Tenures in Various Countries (Being a series of essays published under the sanction of the Cobden Club). Edited by J. W. Probyn, p. 95.

³ Collected Papers, Vol. I, p. 175.

power of discrimination. We are so accustomed to see all the ages jumbled together in our 19th century law that nothing surprises us, and any semblance of explanation which may be offered for existing institutions is accepted as satisfactory. Feudalism is a good word, and will cover a multitude of ignorances. To ask what was the real connection between feudalism and primogeniture would argue a reprehensible discontent with beliefs sanctioned by Blackstone and orthodoxy." It is indeed difficult to deny that there is much truth in these indig-

Vinogradoff supports
Maitland.

nant remarks of Prof. Maitland ; and he has the support of the greatest living authority on the point. Sir Paul Vinogradoff emphatically

asserts " that there is no necessary connection between servility and the unification of holdings." The superimposition of a lord's power might have " strengthened the unifying tendencies and contributed to give them definite shape, but their origin is to be sought in the requirements of the economic situation, which made for unity as against dispersion, and which was especially strong in primitive times when the single man was no person.¹ In spite of the luminous researches

Sir H. Maine asserts
feudal origin.

of Sir Henry Maine assuring us that " primogeniture did not belong to the customs which

the barbarians practised on their first establishment within the Roman Empire,"² and that " an absolutely equal division of assets among the male children at death was the practice most usual with society at the period when family dependency was in the first stages of disintegration,"³ we cannot altogether ignore the large mass of evidence that we now possess pointing

¹ Outlines of Hist. Jurisprudence, p. 284. Cf. also Simcox, Primitive Civilization, Vol. I, Chap. IV.

² Ancient Law, 227.

Gibbon leans towards the same opinion (Hist. Decl. and Fall of the Roman Empire, V, 65, c. 44).

³ Early Hist. Inst., 198.

to a different conclusion. Sir H. Maine indeed asserts that the privilege of the eldest son was unknown both to the Hellenic and to the Roman world. But the proposition, so far at least as regards the former, has been controverted by other eminent scholars.

Prof. Hearn's
opinion.

"The older Greek customs," says Prof. Hearn,¹ "if they do not in express terms state the rule, recognize it by necessary implication. There was a constant effort of the Hellenic conservative party, in Sparta, in Thebes, in Corinth, and other cities, to revert to the old practice of a determinate number of lots or

Traces of Primogeniture in Greece.

hereditary properties in each city; or, as it is sometimes expressed, of having only a given number of families. Such an attempt shows that the right of the eldest had existed; and that it was at that time in a state of decay." Speaking of Rome, this eminent scholar says, "If we do not find similar evidence in the history of Rome, we must remember that our knowledge of Roman Law commences at a comparatively late period of its development."² Add to this the evidence

Absence of such
traces in the history
of Rome—probable
reason.

of the custom prevailing amongst the ancient Hindus³ as well amongst the Semitic races,⁴ and it will indeed be hard to sustain the theory that Primogeniture did not precede Feudalism. It may indeed be, as has

¹ The Aryan Household, p. 81; see also the Dialogues of Plato (Tr. by Jewett), Vol. V. p. 122: "And in order that the distribution may always remain, they ought to consider further that the present number of families should be always retained and neither increased nor diminished.....Let the possessor of a lot leave the one of his children who is his best beloved, and one only, to be the heir of his dwelling and his successor in the duty of ministering to the God, the state and the family as well the living members of it as those who are departed when he comes into inheritance....."

² The Aryan Household, p. 81.

³ See *ante*. See also Sarvadhikary's "The Principle of the Hindu Law of Inheritance" (T. L. L.), 2nd Ed., pp. 174, 176, 177-182.

⁴ See *ante*.

been thought by Prof. Hearn,¹ that this succession of the eldest, or, as the case might be, of the youngest in the primitive family, was something altogether different, both in its nature and in its origin, from that which we now call primogeniture. It may also be otherwise. These primitive forms might indeed have supplied the antecedent ideas on which the sense of convenience worked and brought about the new combination. Law is indeed a secondary phenomenon, being the result of remoter antecedents. In law therefore, above all things, we must not confine ourselves to the streams but seek the sources.

The search after these sources may lead us to families that confront us on the very threshold of Aryan society. And it remains to be seen whether we may not with profit pursue our search back to an earlier period than that in which the family ties and the family relations, knit together by the paternal power, are supreme, while society itself is based on consanguinity alone. For our present purpose it is not necessary to enter into the controversy as to whether the patriarchal family with the tyrant power of the paterfamilias and agnetic relationship was preceded by clan of savage tribes whose kinship, if recognized at all, was done so only through females.² All that may be remembered here is that if the evidence we have of the customs of modern savages cannot all be ascribed to the invention or credulity of travellers, it seems reasonable to infer that there might have been, at some time or other, a pre-historic period when relationship was only acknowledged through females.³

¹ The Aryan Household, p. 83.

² Both the theories have found very able exponents: the first in Sir Henry Maine and the latter in Sir John Lubbock and Mr. McLennan.

³ For the Indo-Aryans such an age, if any, must be Pre-Vedic. The Vedas supply ample evidence of patrilineal family with father at its head. See Rik-Veda III. 53, 2 : IV. 17, 12 ; IV. 17 17 ; V. 43, 7 ; VI. 132, 19 ; VII. 103, 3 ; VII. 86, 4 ; X. 7. 3 ; etc. etc.

Results of anthropological¹ investigations during the past half century have proved that *mutterrecht* (mother-right) everywhere preceded *paterrecht* (father-right)² and the reckoning of descent in the modern civilized fashion through both parents has grown out of it.

The extension of our social retrospect to so early a period as that which coincides with the general prevalence of matrilineal family, appears at first sight like beginning a history of India with a discriminating disquisition on the domestic arrangements of Vaivatswata Manu, and may perhaps suggest a reproach analogous to that incurred by the historian of the Trojan war, who commenced his narrative with an account of the incubation of Leda's egg. Yet indeed it is not so, as I hope to persuade you in the next few pages. It may be, we shall meet with scanty evidence of any proprietary privileges attached to the position of an eldest son in such remote ages. "It has, in fact, been declared authoritatively that in the hypothetical state of primitive society, in which the mother is the only fixed element in the family, there is no ground for giving precedence to the eldest child."³ "It is only when the family has been founded, that is to say, when the father and mother of a family are united for life to each other and their children, that the latter form a community within which degrees of precedence can be counted." But such privileges might not have been the original concomitant of the institution. There is reason to believe that

Scanty traces of proprietary privileges attached to the position of the ancient primogenitus.

¹ See Hartland's *Primitive Paternity*, Chap. IV. See also Madras Govt. Mus. Bull. III, 45; Ind. Cens., 1901, XX, 154. Read also Smith's "Kinship and Marriage in Early Arabia," and Letorneau's "Evolution of Marriage."

² Evidence is collected mostly from the customs of the retarded people: it must however be remembered that the customs of modern savages reflect a fairly true image of an undeveloped condition of a civilized nation.

³ Simcox, *Primitive Civilizations*, Vol. I, p. 121.

in their incipency the ideas attending on the original conception of primogeniture were duties rather than rights, and that such duties were more official or religious than proprietary. It may very well be that at first the position of the Primogenitus was marked by onerous duties, alone, round which, by degrees, some privileges clustered. These duties in time diminished and vanished while the privileges survived and increased.

A glance at a still earlier fate of the Primogenitus may not be quite out of place here. Without hazarding any opinion as to the existence of any visible or invisible connection between the modern Primogenitus and the archaic one, it may only be noticed here how often the primitive first-born had to meet with his death simply because he happened to be the first-born.¹ His birth-right consisted of this unenviable privilege of being put to death soon after his birth.²

¹ In point of fact it seems, at least among the Hebrews, to have been only the first-born child that was doomed to the flames. Micah, VI. 6-8: "Wherewith shall I come before the Lord, and bow myself before the high God? Shall I come before him with burnt offerings, with calves of a year old? Will the Lord be pleased with thousands of rams, or with ten thousands of rivers of oil? Shall I give my first-born for my transgression, the fruit of my body for the sin of my Soul?"

See also Ezekiel, XX. 26: "And I polluted them in their own gifts, in that they caused to pass through the fire all that opened the womb."

² See Dr. Frazer's *Dying God*, pp. 179-80, and Westermarck, *The Development of the Moral Ideas*, pp. 458-460.

In some tribes of New South Wales the first-born of every woman was eaten by the tribe as a part of a religious ceremony (Smith's *Aborigines of Victoria*, II. 311).

Among the tribes about Maryborough in Queensland a girl's first child was almost always exposed and left to perish. (A. W. Howitt, *Native Tribes of South East Australia*, 750.)

Whether or not the privileges which the eldest sons now enjoy were earned for them by the life-blood of these primitive first-borns, it is a notorious fact that the custom of sacrificing the

The natives of Rook, an island off the East Coast of New Guinea, prided themselves on their humanity in burying the murdered infants instead of eating them as their barbarous neighbours did.

Chinese history reports that in a state called Khai-muh, to the east of Yuch, it was customary to devour the first-born son (de Groot, *Religious System of China*, II, 679 ; IV, 364. See also IV. 365).

In Eastern Africa amongst the people of Senjero there is a custom that the families must offer up their first-born sons as sacrifices, because once upon a time when summer and winter were jumbled together in bad season and the fruits of the earth would not ripen—the sooth-sayers enjoined it.

For the prevalence of the custom in Europe, see P. W. Joyce, *Social History of Ancient Ireland*, I, 275 ; 281-284. See also Dr. Frazer's *Dying God*, pp. 183-186.

As to India see Moore's *Hindu Infanticide*, p. 198. W. Crooke's *Popular Religion and Folk-lore of Northern India*, II, 169. Sherring's *Hindu Tribes and Castes*, III, p. 66.

The custom prevailed also amongst the Semitic races : Exodus, IV. 24-26, XIII. 1 ; 12 ; XXII. 29, Deut., XVIII. 9-12 ; Micah, VI. 6-8 ; 2 Kings, XVII. 16-17. It specially prevailed among the royal families of the archaic days. Among the Semites of Western Asia, for example, the king, in a time of natural danger, sometimes gave his own son to die as a sacrifice for the people, "When the King of Moab saw that the battle was too sore for him, he took with him seven hundred men that drew swords, to break through even unto the King of Edom ; but they could not. Then he took his eldest son that should have reigned in his stead, and offered him for a burnt offering upon the wall" (2 Kings, III. 26-27). The suspicion that this barbarous custom of sacrificing the eldest son by no means fell into disuse even in later days, is strengthened by a case of human sacrifice which occurred in Plutarch's time, at Orchemenus, a very ancient city of Boetia, distant only a few miles across the plain from the historian's birth place.

first-born was almost as wide as the earth itself.¹ And it cannot certainly ameliorate the hard fate that befell these unfortunate predecessors of "the magnificently fed and coloured drone"² of the present age, even if we can trace out the real reason for the origin of such a cruel custom. May be that it was a purely prudential consideration which gave birth to this fatal custom.³ May be that the death of the unfortunate child became necessary to give a new lease of life to its father.⁴ May be that the child had to be removed as it was believed to have endangered the life of the father by absorbing his spiritual essence or vital energy.⁵ It is needless to stop here to examine

Unlucky predecessors of the magnificently fed and coloured drone of the modern age.

¹ Golden Bough by Dr. Frazer. The Dying God, Chap. VI, pp. 179-189.

See also Westermarck, "The Origin and Development of the Moral Ideas," Vol. I, pp. 458-460.

W. Crook's Popular Religion and Folklore of Northern India, II, 169.

P. W. Joyce, Social History of Ancient Ireland, I, 275 ; 281-284.

Religious System of China (de Groot), II, 679 ; IV, 364.

Groot remarks, "Quite at a loss, however, we are to explain that eating of first-born sons by their kinsfolk absolutely inconsistent as it is with a primary law of tribal life in general, which imperiously demands that the tribe should make itself strong in male cognates but not indulge in self-destruction by killing its natural defenders." See also Indian Antiquary, XXXI, p. 162. Read also Exodus, IV, 24-26. The obscure story told by the Israelites to explain the origin of circumcision seems to suggest that the custom was to save the life of the child by giving the deity a substitute for it. Cf. Wundt, Folk Psychology, pp. 211-212.

² Mr. M. L. Newman so names the primogenitus.

³ Dr. Frazer (The Dying Gods) at page 187, says, "It cannot have been purely prudential consideration of adjusting the numbers of the tribe to the amount of the food supply."

⁴ Westermarck, "The Origin and Development of the Moral Ideas," p. 460. See also Dr. Frazer, The Dying Gods, p. 188.

⁵ Dr. Frazer, p. 188.

how far the superstitious faith in the transmigration or re-birth of souls had operated to produce this regular custom of infanticide and how far the custom was the solution of a painful dilemma to primitive fathers as to who should live.¹ Whatever might have been the reason, the custom was there and cost many a first-born his life and blood.²

But we are straying away hopelessly. To trace the development of the institution under our review through all its different stages may indeed launch us into an inquisitive examination of the various circumstances, conditions and laws whether imposed by sovereign power or sanctioned by custom and tradition. The entire social atmosphere of different ages and of different peoples must be scrutinised in an inquiry into the origin and history of primogeniture ; and it is indeed a hard task to steer clear of all quagmires. The simple channel of enquiry is so difficult to distinguish from its muddy tributaries, that even an incomplete sketch of the subject must needs often stray into them, into provinces having no apparent connection with it.

It is said that in the recorded history of those ancient peoples with whose annals we are most familiar, traces of any

¹ Cf. Hindu belief in father's rebirth in son :

पतिर्भार्यां सम्प्रविश्य गर्भो भूलेह जायते ।
जायायास्तस्मिन् जायते यदस्य जायते पुनः ॥

Manu, IX. 8.

Cf. Rose's views as to the origin of Devakaj among the Punjab Ksatrias. As soon as the first child is conceived the father is supposed to have died and his funeral rites are actually performed in the fifth month of pregnancy. After the birth of the child parents are remarried.

² This custom of sacrificing the eldest son was specially prevalent in the royal families. Dr. Frazer's *Dying Gods*, pp. 160-166.

Dr. Frazer's opinion that these sons were sacrificed either as substitutes for the people or for their Royal sires should be noticed carefully.

institution similar to that of modern primogeniture are extremely slight. If by primogeniture we only mean "that the male issue shall be admitted before female, and that, when there are two or more males in equal degrees, the eldest only shall inherit, but the females "all together,"¹ then ancient records may indeed contain but scant references. But primogeniture embraces all the cases of single inheritance, and may indeed be defined as the prerogative enjoyed by an eldest son or occasionally an eldest daughter, through law or custom, to succeed to their ancestor's inheritance in preference to younger children. Nay, we might even make it more comprehensive, extending it to all cases of single succession depending upon priority in birth.

Prof. Hearn takes the modern institution in the narrower sense when he distinguishes it from its early prototype by saying that "in archaic days the heir did not take the property for his own use : he merely acquired the defined and well-understood position of manager of the common property. He succeeded to an office and not to an estate. The household with its property, upon the demise of its chief, remained as it was before. A new chief succeeded to the position of his father, and that was all."² Be that as it may, we must not forget that our object is not only to trace the streams but also to seek the sources ; and however slight be the similarity between the two we cannot afford to ignore these archaic forms altogether. For however difficult it may be to observe the actual conditions which brought the embryo into life and light, it can, with much confidence, be assured that the seeds of modern primogeniture

¹ Blackstone.

² Aryan Household, p. 83.

See also the Dialogue of Plato translated by Jowett, Vol. V, sec. 740.

Cf. Manu :—न्येष्ट एव तु यज्जीयात् पित्रा धनमश्वतः ।

शिशुस्तुपुत्रीपुत्र्युयं च पितरं तथा ॥

Cf. also Manu :—विधयारोक्तः सर्वान् न्येष्टो भ्राता यथा पिता ।

भ्राता शक्तः कनिष्ठो वा शक्तपेक्षा कृषी क्षितिः ॥

must have been lurking somewhere in the 'primitive family.' Sir Henry Maine¹ says, "There are always certain ideas existing antecedently on which the sense of convenience works, and of which it can do no more than form some new combination." Our problem now is to trace out such ideas in the hidden past of the races.

It will not be a fruitless task for us to scour our ancient Hindu literature for the purpose. That such a custom prevailed among the ancient Hindus² is amply borne out by ancient texts. "The entire paternal estate," says Manu, "shall be received by the eldest alone. The rest will depend on him for their maintenance as on their father."³ And the reason which he assigns for this rule of law is, that at the very moment of an eldest son's birth his father had discharged a debt due to his ancestors. This is also the reason why he should be favoured with special shares at the partition of inheritance.⁴ This shows that even in the days of Manusmriti the idea of primogeniture had a past history of its own, and had, by that

¹ Ancient Law, p. 233.

² Jolly, T. L. L., IV, 85; Ghose on Impartible Property, p. 12; Sarvadhikary's Hindu Law (T. L. L.), pp. 174, 176.

³ अष्ट एव तु गृह्णीयात् पित्र्यं धनमशेषतः ।

शेषास्तपुजोविद्युर्थैव पितरं तथा ॥ (XI, 105.)

See also Gautama—सर्वे वा पूर्वजस्येतरान् विभ्रयात् । (IX XIX.)

Gautama uses the Vedic term अष्टिनेय to mean son of the first wife and gives him special shares. Cf. Manu, IX. 123-126.

Cf. Also early Japanese custom :

"In Japan, as formerly among the Basques, filiation is subordinated to the transmission of the patrimony whole and inalienated. It is to the first-born, whether boy or girl, that the inheritance is transmitted and he or she is forbidden to abandon it."—Letourneau's Evolution of Marriage, p. 323.

⁴ अष्टेन जातमपि पुत्रीभवति मानवः ।

पितृश्रामदुष्यते स तज्यात् सर्वमर्हति ॥

(Manu, IX. 901.)

यस्मिन् यं सन्नयति येन ज्ञानम्यमनुते ।

स एव धर्मजः पुत्रः कामजातितराभिदुः ॥

(IX 107.)

time, crystallised itself into set forms and formulas from out of its nebulous part ; and the lawgivers were already busy at that time finding out its *raison d'être*. Manu does not even forget the order amongst the twins, and discusses at length the various rules regarding the positions of sons by different wives. Even Gautama Sutra, though always very terse, suddenly grows prolific while coming to discuss these rules, and gives rather a detailed disquisition of the relative positions of sons by different wives.¹ Equally interesting survivals of the law of primogeniture may be traced in various systems of unequal distribution,²

¹ Gautama, XXIX.

² Sir H. Maine indeed is of opinion that this favour was granted rather as a security for impartial distribution of the inheritance than from any inherent right. Early Hist. Inst., 197. For a full criticism of this view see *post*. It may be noted here that there are texts that would go to show that this right to special share was the result of gradual restrictions imposed on some higher right of the eldest. Moreover the texts like *ब्रह्मविद्विभक्तानां धर्मः पितृकृतः अतः* surely do not point to any such origin of the rule. Nor does Vrihaspati's rule giving double share to first by birth, by science or by good qualities indicate such an origin of it. See also Jolly, T. L. L., pp. 178-181.

The custom of giving an extra share to the eldest prevailed among all the Aryan nations. Prof. Hearn says that, "When original households separated into several related but independent households, the reasons of the rule as to the succession of the eldest ceased, and consequently the rule itself was disused. If there were several sons, each of whom became a House-father, and was therefore charged with the care of the Sacra of the house, the performance of their separate Sacra necessitated the division of property. We are, therefore, prepared to find that in societies where the division of the household was habitual the custom of succession of all the sons should have been established. Yet even in these cases we find vestiges of the archaic system. The eldest son has usually some advantages in the distribution. Among these advantages we sometimes meet with one that is especially significant. He retains the holy hearth (p. 81). See also Prof. Sarvadikary's Hindu Law (T. L. L.), p. 174. (Second Edition.) Also at page 176 where he says primogeniture represented the claims of communism and the principles of equal distribution represented those of individuality.

found in all the 'Dharma Sutras and Smritis.¹ That it was not a mere academic discussion may be safely judged from the details adduced and the space devoted for the purpose.

Domestic religion of a sacrificial form was indeed a prevailing influence working in favour of the ancient form of Hindu primogeniture. The Aryan conception of law in these early days was indeed based mainly on religious beliefs, and especially on those regarding the destiny of men after death. To die without a son was equivalent to eternal damnation, not only of himself, but of all his ancestors who have left no progeny behind.² Of such sons again the eldest alone was of special religious merit : स एव धर्मजः पुत्रः कामजानितरान् विदुः.³ And as soon as he was born his father was discharged of his debts⁴

¹ Gautama, XXIX, Vishnu, XVIII, 37, 6, 13, 3, Vasistha, XVII, 42-45, Baudh., II, 5, 3, 39, Narad, XIII, 13, Apast., II, Manu, IX, 112-123, Yaj., II, 118. Yajnavalkya confines the rule to distribution by the father during his life-time. Kautilya, however, disapproves of this unequal division by father—जीवन्निर्भागे पिता नैव विंशयेत्—and enjoins partition only when the inheritors attain majority, प्राप्तव्यवहाराणां विभाजः। अग्रास्यवहाराणां द्वेयं विंशयेत्. For this cf. Arabic law of the pre-Islamic age according to which daughters and minor sons were excluded altogether from inheritance (Smith's Kinship and Marriage in Early Arabia).

Cf. also Rig-Veda, III. 45, 4 : आनसुजं रयिं भरायं न प्रतिजानते ।

² Mahabharata, Astika Parva (Adiparva, 13th chapter). See also Ait. Br., Narada's reply to king Harishchandra (XXXIX, VII. 20).

³ Manu, IX, 107. (This may be the result of another theory according to which son is father reborn, cf. Manu, IX, 8.) Cf. Rose's view as to the origin of Davakaj among the Punjab Ksatrias. As soon as the first child is conceived the father is supposed to have died and his funeral rites are actually performed in the fifth month of pregnancy. After the birth of the first-born the parents are remarried, cf. also Japanese Beliefs, Letourneau, p. 323.

⁴ Vedic Aryans considered undischarged debts as taints that would mar all their after-life prospects and would remain attached to the body

and became entitled to eternal happiness in his existence after life.¹

These ancient Hindus regarded the eldest son as of supreme concern. He had the right to pronounce the funeral prayer as though he had shown some special merit in coming into the world first. He was future domestic high priest, and at his father's death special respect was due to him. He had the right to marry a wife first, and if any of his younger brothers

almost in physical sense, not only of the author of it but also of his descendants.

See Ath. Veda, XIX, 57, 1; VI. 119, 3; VI. 117; VI. 118; cf. Rig-Veda, X. 7, where Rishi Trishira thinks that water can wash all sins. Such confusion of moral and the juristic with the physical is common to all the Aryan nations. Ate, the Homeric Nemesis, pursues whosoever wilfully and unconsciously disturbs the harmony of nature. The disturbance in every case demands expiation and penalty upon the author or his descendants. Vishnu says, बादशरात्रेण पूर्वपुत्रकृतमपि पापं निर्दहति. Cf. Chinese custom of punishing the sons for the offence committed by the parents (Gray's China, p. 82). It may be noted that, whether or not a legal liability, we hear of sons' concern with such debts as early as the Rig-Veda where their liability seems to have been independent of any asset coming to their hands. Men of this age considered undischarged debts as taints that would mar all their after-life prospects, and would remain attached to the body almost in a physical sense, not only of the author of it but also of his descendants. See Miraglia, p. 126; Spencer, Principles of Sociology.

परशस्य सावीरस्य मत्कृतानि माहं राजन्मन्त्रतेमभोजम् ।

अमृता इन्द्र भृगुसीरवास आनीजीवान्मदयता सुभाषि ॥

(Rigveda, II. 28, 9.)

इयमददाद्रभसस्यच्युतं दिवोदासं वज्रादायुषे ॥

(Rig., VI. 61, 1.)

¹ *Ibid*; also Ait. Br., XXX. VII., 20. See Anc. City, Chaps. I and II, also "The Mythology of Races" (Fox), Volume I, p. 6, where Greek Titans' sons are named, among these being Thanatos (Death) and his brother Hypnos (Sleep). See also Miraglia, Comparative Legal Philosophy, p. 126.

took a wife before him ¹ such impudence caused his degradation in society. After his father's demise, as the eldest in the family, he stood out pre-eminently as the official and religious head, and was, within his own domestic domain, a complete temporal and spiritual "Papa."

In spite of the weighty opinion of Sir H. Maine, the early ages of Greece and Italy, as I have already told you, cannot escape suspicion of partiality for this widely prevalent custom. It may indeed be a matter of doubt how far this suspicion is well-grounded ; but M. Fustel de Coulanges ² draws inference from Aristotle and Demosthenes to this effect. The provision of the Theban Code that the number of lots of land should remain unchangeable, certainly excluded the division among brothers ; and the Corinthian law limiting the actual number of families in the state presumably had the same object. The conservative spirit of Sparta long retained a restriction forbidding the sub-division of inheritances ; and in Athens it was customary that the eldest son should keep the family house, and, what was more important, the household gods in addition to his share of the property ; and he alone had the right to the family name. From these facts M. de Coulanges adduces the existence of a *droit de' ainesse* in Corinth, in Sparta and in Thebes. The case of Athens is more nearly on a level with the Hindu practice just mentioned.

A peep into the social life of the Chinese, the most ancient civilised people on the surface of the earth, will also show that though primogeniture in its modern sense might not have been known to their forefathers, yet seniority in birth had, as its appanage, some privileges of much weight. A more detailed examination of the customs and usages of this people is reserved for a subsequent chapter : it will be sufficient here to refer to the position

A peep into the Chinese social life also reveals such traces.

¹ He is called श्रीगुरु and is not a fit person to be present at a Śrāddha.

² Ancient City (Tr. by Willard Small), 108-110.

of the eldest son in the ceremony of the turning of the bridge-ladder and in his retention of the ancestral tablets.¹ These tablets always descend in the eldest male line, and the younger branches must be content with imitations of inferior virtue.² And here we might also notice a curious and burdensome privilege enjoyed by the Chinese eldest sons by which they are required or permitted to wear the three years' mourning for their own eldest sons only.³ In Japan, as formerly among the Basques, filiation is subordinated to the transmission of the patrimony whole and inalienated. It is to the first-born, whether boy or girl, that the inheritance is transmitted; and he or she is forbidden to abandon it. At the time of marriage the husband or wife must take the name of the heir or heiress who marries and personifies the property.⁴

Traces are not wanting even in early Japan.

The Pentateuch is a much more definite quarry of information. In Genesis, Chapter V, the book of the generation of Adam, the descent of Noah from Adam is traced, and you must have noticed that he represents the eldest male line. This Noah alone found grace in the eyes of the Lord, and "God said unto him, the end of flesh is come before me; for the earth is filled with violence through them: and behold, I will destroy them with the earth.....with thee I will establish my covenant."⁵ This sparing of the issue in the eldest male line of

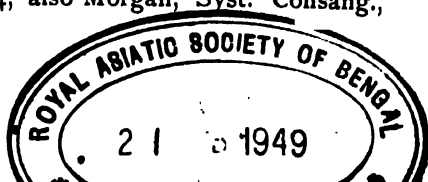
¹ The Social Life of the Chinese (Rev. J. Doolittle), Vol. I, Chap. VI, 170; see also Grey's China.

² Rev. J. Doolittle, "The Soc. Lif. Chin.," Vol. I, Chap. VIII, pp. 217-221.

³ Prof. Simcox says "they may do so because these eldest sons represent the direct line of the father and the grandfather." (Primitive Civilization, Vol. II, p. 70.)

⁴ Letourneau, Evolution of Marriage, p. 323. See also Hartland's Primitive Paternity, Vol. II, p. 14, also Morgan, Syst. Consang., p. 428.

⁵ Genesis, Chap. VI, 13 and 18.



Adam is significant : specially so, when we take it along with other more definite passages indicating the importance attached to the priority of birth. Whenever he is pleased, he rewards by saving the first-born, and when angry, he punishes by destroying them. When he, in order to favour the Israelites was bent upon ruining the Egyptians "it came to pass that, at midnight, the Lord smote all the first-born in the land of Egypt, from the first-born of Pharaoh that sat on his throne unto the first-born of the captive that was in the dungeon."¹ And it is not straining the meaning of Isaac's blessing upon Jacob to say that this was a method of nominating an eldest son when he says "Let the people serve thee, and nations bow down to thee; be lord over thy brethren, and let thy mother's sons bow down to thee." You know Esau and Jacob were twins, and of them Esau came out first.² That the first-born had some preferential right is evident from the fact that Jacob thought it worthwhile to purchase this right from Esau.³ Up to the time of Moses, a man, having plurality of wives, often nominated the eldest son of his favourite wife to enjoy the privileges of the eldest⁴ for the purpose of succession, even though really he was not the eldest of all the children in point of seniority. This seems to have been prohibited by Moses: "If a man have two wives, one beloved and another hated, and they have born him children, both the beloved and the hated, and if the first-born son be hers that was hated, then it shall be, when he maketh his sons to inherit that which he hath, that he may not make⁵ the son of the beloved first-born before the son of

¹ Exodus, XII, 39.

² Gen., XXVII, 29.

³ Gen., XXV, 24, 25.

⁴ Gen., XXV, 31-33. This shows that this birthright was transferable.

⁵ Cf. Satapatha Brahmana, V, 4, 2, 9.

⁶ As to father's power of making any one 'first-born' cf. our story of Sunasepha. Note how Vîsvamitra wants to make him his eldest son.

the hated, which is indeed the first-born but he shall acknowledge the son of the first-born, by giving him a double portion of all he hath; for he is the beginning of his strength, the right of first-born is his."¹ The double portion of Elijah's spirit asked for by Elisha may possibly have some reference to this ordinance of Moses.² It may be noted here that no law of primogeniture was followed in cases where property descended to daughters³ who could, so far as can be gathered from the Pentateuch,⁴ inherit the property of their fathers in case they died without male issue. But the daughters took upon condition that they were not to marry out of their own tribes.⁵

It must have been noticed from what has been said of Esau and Jacob, that the birthright was transferable. It appears further that such a right was liable to forfeiture too. Reuben, the first-born of Israel, lost his birthright as he defiled his father's bed,⁶ and it was given to the sons of Joseph. The partibility of inheritance continued till the time of Christ, and we may infer from the Parable of the prodigal son that it was not unusual to have it done even in the lifetime of the father.⁷ That the inheritance included landed property also would appear from the account of a census report of the people of Israel contained in the Pentateuch.⁸

¹ Deuteronomy, XXI, 15-17. This has been adopted as law by the New England States. See Select Essays in Anglo-American Legal History, Vol. I, p. 437.

² 2, King II, 9.

³ Num., XXVII, Equal division of property left by Zelophehad.
Cf. Manu, अष्टाध्यायी १०.१.१०.

⁴ Numb., XXVII, 8, 9.

⁵ Numb., XXVI, 6, 7, cf. Grotyn, Law on the Marriage of Heiresses.

⁶ 1 Chron., V.

⁷ Luke, XII, 13; XV, 12.

⁸ Numb., XXXVI, 51-65.

Although the evidence of privileges due to mere priority in birth, which has just now been laid before you, tends to show that it is not quite so scanty in the ancient world, yet if we peep into a still earlier period you will appreciate the truth of the statement that in the remotest period of human history, in the pre-historic ages, this favouritism based on an accident of birth was not quite so prevalent. In Vedic India, for example, we do not meet with any rule recognizing such a custom. It is true, we have no definite knowledge of the law of inheritance prevailing among these Vedic Aryans. References to such law are so scanty in the Vedic literature that anything that will be said of it may be no better than mere conjectures. Yet what little evidence of the rule of succession we have for this age, does not indicate any vestige of special proprietary privileges involved in the priority of birth. In the Rigveda¹ we meet with a doubtful reference to the distribution of property among his sons by Manu, the father of mankind; and Taittiriya Samhita² basing on this Vedic sukta speaks of division of property by Manu among his sons. In the Oitareya Brahmana the division is given as having been made during the lifetime of Manu by his sons.³ According to Jaiminiya Brahmana⁴ again, four sons divided the inheritance⁵ while their old father Abhipritarin was still alive. And it will not indeed be putting

Earlier history of the nations does not disclose this favouritism.

Vedic India and the position of the eldest son.

Partition of inheritances in Vedic India.

¹ X, 61.

² III, 1, 9, 4.

³ Oit. Br., XXII, नामानेदिष्ठं वै मानवः ब्रह्मचर्यं वसन् भ्रातरो निरभजन सोऽब्रवीद्विष् किं मङ्गमभारोत्येतथैव निष्ठावमववदितारम्—सपितरमेत्या ब्रवीत्वा इ वाच मङ्गं तत् तामासुरितं पिताऽब्रवीन्मापुत्रकं तददृष्ट्या ।

⁴ Jaim. Br. III, 156.

⁵ Vedic दाय did not imply property of the deceased. It is not the same as the Roman inheritance which was a succession in *universum jus quod defunctus habuit*.

a very strained construction on the words of the fourth *rik* of the forty-fifth sukta in the third mandal of the Rigveda to take it as indicating the possibility of a partition between a father and his sons.¹ In none of these instances however we hear of any special share for anybody. There are indeed some texts that would point to a period when a father might prefer any of his sons while dividing his property among them² and might perhaps exclude any of them altogether. There are also passages in the Vedic literature which probably refer to father's right of nominating one of the sons³

Father's right of nominating one of the sons to succeed him.

to succeed him. "He then returns," we are told in the Satapatha Brahmana,⁴ "to the Garhapatya fire, his son holding on him from behind, and offers with 'O Prajapati, than

thee none other hath encompassed all these forms: for whatsoever object we sacrifice let that accrue unto us!' This one is the father of N. N.—him who is the son he makes the father, and him who is the father, he makes the son; he thereby links together the vigour of both of them—"

We would not here enter into the question as to what legitimate inferences can be drawn from these and similar other evidences supplied by the Vedic literature, and whether there is any substance in the assertion "that the custom of distribution *inter vivos* by the father was availed of to obviate the otherwise

¹ बानसुजं रथिं भरांश्च न प्रतिजानते ।
तच्च पक्वफलमन्वीष धूनुहीन्द्र संपारणं वसु ॥ (III, 45, 4.)

² Panchavimsa Brahmana, XVI, 4, 4.

³ It was not obligatory on him to nominate any particular son. He nominates whichever son he likes. And to him who is his dearest son he hands that vessel, thinking "May this son of mine perpetuate this vigour of mine." Sat. Br., V, 4, 2, 8 (S. B. E., Vol. XLI, p. 97).

⁴ S. B. E., Vol. XLI, p. 97. According to the ceremonial of the Black Yajus this offering of the residue takes place at the house first of the favourite son and then of the queen. Taitt. S., Vol. II, p. 154.

But this refers to a Royal family only.

harsh and unconscionable operation of the then prevailing law of primogeniture which vested the entire property in the eldest son at his father's demise."¹ All that we may note here is that though partition of inheritances was quite known to our Vedic forefathers, so much so that the very name भाग was applied to property,² nowhere we are told of any special claim of anybody. It will not indeed be out of place here to mention that the idea of inheritance amongst these ancient Aryans somehow or other got mixed up with the idea of reward for exertion.³ The word दाय in the Rigveda⁴ bears the import of 'reward of exertion,' though later it⁵ only means 'inheritance.' There might have been a time when inheritance had to be earned;⁶ how, we shall see later. If, indeed, at any period of human history right to inherit was preceded by some onerous duty, the right being simply a reward for the discharge of such duty, that would, as has already been suggested, offer an explanation of the origin of the institution under our review. A detailed discussion of the question must necessarily be postponed till the concluding chapter of this book. It may however be noted here that though an eldest son does not figure so prominently in his

¹ Rai Bahadur J. C. Ghosh seems to be of this opinion. See his T.L.L., p. 17. The view however seems hardly tenable. It presupposes the existence of the law of primogeniture in the modern sense during this Vedic age. The Vedic literature, I am afraid, does not bear him out in this assumption. For a fuller discussion, see later.

² सुभागान्नी देवाः ऊगतासुरावन्मान् कीदृश्यादती वाडवानाः ।

(X; 78. 8.)

See also VIII, 90, 6, VII, 32, 12; IV, 17, 11.

³ See Macdonell's Vedic Index : 'Daya.'

⁴ अस्या अन्तं पर्येकचरन्तिरस्यधुर्दुष्टासो अस्तु ।

अस्य दायं विभज्यन्ते भ्यो यदा यनो भवति इत्यर्हितः ॥

⁵ Sat. Br., XII, 4, 3, 9; Nirukta, III, 4; Ath. Veda, V, 18, 6, 14; Oit. Br., VII, 17, XXXIII, 5, Sankh. Srauta Sutra, XV, 27, 3, etc.

⁶ See also Pentateuch, Genesis, XXVII.

proprietary rights during this early Vedic age,¹ his position in matters spiritual seems already to have crystallized in supremacy over his younger brothers: "इदम् वाव तत् ज्येष्ठाय पुत्राय पिता ब्रूयात् प्रणय्याय वा भ्रूतेवासिने नान्यस्मै कस्मैचन." ² A father, so says the Chhandogya Upanishad ³ "may therefore tell that doctrine of Brahman to his eldest son, or to a worthy pupil. But no one should tell it to anybody else." And the story told by the Oitareya Brahmana ⁴ that Sunasepha decides to become Visvamitra's son only when the latter agrees to make him the eldest son and the episode resulting therefrom ⁵ are indeed very significant hints at some sort of privileges involved in the position of the eldest. The privileges, whatever these were, were perhaps only spiritual as would appear from what Visvamitra himself announced on the occasion; उपेया दैवं मेदायं तेन वै त्वोपमन्त्र्य इति.⁶

Position of the eldest son in spiritual matters.

It has been stated above that there is nothing in the Vedic literature that would go to indicate any special proprietary privileges attached to the position of an eldest son.⁷ The proposition however needs a modification in view of the fact that the normal condition of an early Vedic family

Normal condition of an early Vedic family and the position of the eldest son in it.

¹ Prof. Sarvadhikary however quotes a passage from the Taittiriya Samhita to the effect "They distinguish the eldest son by the heritage." This would go to show that such eldest sons had some special claim to the heritage at least during the period of this Samhita (Sarvadhikary, p. 177).

² Chh. Up., III, 14, 5 and 6.

³ S. B. E., Vol. I (Upanishad, Part I), p. 44.

⁴ सहीवाच विश्वामित्रो ज्येष्ठो मे त्वं पुत्राणां साक्षात् ज्येष्ठा प्रजा सात्

(Oitr. Br., XXXIII, 5.)

⁵ Ibid.

⁶ Oit. Br., XXXIII, 5. See Prof. Sarvadhikary's Hindu Law (T.L.L., Second Edn., p. 175).

⁷ Prof. Sarvadhikary however seems to think that these and similar passages support the conclusion that the eldest son alone succeeded to the heritage. (Hindu Law, p. 124.).

appears to have been joint, and that in an early joint family the eldest, and ordinarily the ablest, male would, by virtue of his natural superiority take upon himself the management of the family. As the administrative head of the family he would necessarily look like a privileged man. His real position however will be more onerous than privileged. He will have onerous duties both towards the departed and the living. The Rik like “अभीषतस्तदा भरेन्द्र ज्यायः कनीयसः”¹ certainly does not speak of any superior proprietary right involved in the priority of birth; on the contrary the elder brother must, as was natural in such an early family, maintain his younger brothers whether or not he had any family assets. True, we have the Vedic word “jyestha” meaning “greatest” used in the specific sense of ‘eldest brother’² and later denoting “the eldest among sons.”³ There is again the name ‘jyaisthineya’ for a son of the father’s first wife,⁴ who in later India⁵ figures prominently among the claimants of special shares at a partition. We have however, practically nothing beyond the special names for these personages, and it is not safe to draw any conclusion from these scanty materials. There are indeed some passages in the Rigveda⁶ that may refer to some sort of preferential position of the eldest brothers. In the fifth mandal of the Rigveda, for example, we are given

¹ Rigveda, T.L.L., 22, 24.

Cf. Prof. Hearne, p. 83, where he says: “In archaic days the heir did not take the property for his own use: he merely acquired the defined and well-understood position of the manager of the common property. He succeeded to an office, not to an estate. The household with its property, upon the demise of its chief, remained as it was before. A new chief succeeded to the position of his father; that was all.

² Rigveda, IV, 35, 5; V, 11, 2.

³ Ath. Veda, XII, 2, 35; Oit. Br., VII. 17; Sat. Br., XI, 5, 3, 8.

⁴ Tait. Br., II, 1, 8, 1.

⁵ Gautam Sutram, XXIX.

⁶ I, 37, 6; IV, 17, 7; V, 59, 6; V, 60, 5.

Riks invoking the Marutas, and these Riks announce
 “अग्नेष्टासो अकनिष्ठास एते संभ्रातरो वावृधुः सीमगाय ॥”¹ and again
 “ते अग्नेष्टापकनिष्ठास उद्भिदो मध्यमासो महसा विवावृधुः ॥”²
 These however seem only to have reference to a joint family.
 A detailed examination of the position involves several other
 complex questions, and the conclusion must depend upon what
 answers to those questions we are in a position to give.³

If now we pass on to Code Hammurabi,⁴ another very an-
 cient document bearing stamp of pre-historic
 civilization, we will find that although a man
 might show partiality to any of his sons
 during his lifetime by giving him presents of
 his property, at his death however the rest of his property
 would devolve in equal shares on his sons; such sons shall
 share equally in their paternal possessions.⁵
 “If a man decide to thrust out his son, and
 say to the judge ‘I will thrust out my son’
 then the judge shall examine into his reasons, and if the son
 has no grievous fault which justifies his being thrust out, the son
 may not be cut off from his son-ship.”⁶ No-
 where in this code we hear of any preferential
 claim of the first-born. There is however a
 special class of property with respect to which the position of
 all the sons is not equal. Provisions of this code about succes-
 sion to what may be designated as crown lands, and which
 appears to have been held in lieu of the remuneration for ser-
 vice rendered to the state, suggest that only the ablest of the
 sons would inherit them.⁷

Code Hammurabi
 too does not show
 special favour to the
 eldest son.

Equal division of
 inheritances.

An exceptional
 case.

¹ V, 60, 5.

² V, 59, 6.

³ See *post*.

⁴ Evolution of Law Series, Vol. I (Kocourek and Wigmore), p. 387.

⁵ Hammurabi Code, Sections 165-170.

⁶ *Ibid.*

⁷ *Ibid.*

The ancient Accadian laws¹ also give us no rule of primogeniture; and the laws of Grotyn² also speak of equal division of patrimony after the demise of the parents. "The father shall have power over the children and over the goods, over the division thereof, and the mother over her own goods. While they live, it shall not be necessary to divide; but if one should be cast in damages, division shall be made to him that is cast in damages, as has been written. And if one die, the roofs in the city and whatever is in the roofs shall be at the disposal of the sons, and all the other goods they shall well divide, and the sons as many soever as they be, shall be allotted each two shares, and the daughters as many soever as they be, each one share. And they shall divide the mother's things also, if she die."³

The Accadian laws also give no rule of primogeniture.

The above is an extract from the Grotyn law of inheritance and there we find no trace of primogeniture. There is however a preferential treatment of the male over the females; and later when an heiress is required "to be wedded to her father's brother, the eldest of those that are"⁴ we, for the first time, meet with some sort of preference accorded to priority in birth.

Daughters treated as heritable property.

"And if there be more heiress and father's brothers, the second shall be wedded to the next eldest, and so on. And if there be no father's brothers but brother's sons, she shall be wedded to one that is child of the eldest."⁵

¹ Translated by Rev. A. H. Sayle (Evol. Law, Vol. I, p. 375).

² Evol. Law, Vol. I, p. 453.

³ *Ibid*, p. 456, Sec. 5.

⁴ Sec. 10.

⁵ *Ibid*. Cf. Laws of Solon. A daughter was not an heiress but "a person who went with the estate."

In the Salic law¹ also we do not find any trace of primogeniture in the distribution of inheritances.

Salic Law also does not prefer anybody on the strength of his priority in birth.

But of Salic land no portion "shall come to a woman; the whole inheritance of the land shall come to the male sex." This provision

of the *lex Salica* excluded women from inheriting the land and is the basis of all arguments against female inheritors of European thrones. As to the males however there is no provision in it by which one may have any preferential claim on the strength of priority in birth.²

A peep into the Mahomedan world again would show how the institution never could take root in its

Mahomedan genius opposed to primogenitary rule.

soil. Sir Abdur Rahim in giving an erudite view of Mahomedan jurisprudence tells us,

while speaking of rules of succession and inheritance prevailing among the Arabs in the pre-Islamic days,³ that 'on the death of an Arab his possession, such as has not been disposed of, devolved on his male heirs capable of bearing arms, all females and minors being excluded.'⁴ Here indeed was a germ which might, under favourable circumstances bring forth the supreme result. But it did not so develop during pre-Islamic days; and you all know the Prophet⁵ never admitted any

¹ Evol. Law, Vol. I, 406.

² The law relating to 'Chrenecruda' laying down the procedure which must be followed in order to throw the burden of paying wergeld on one of the three relatives of the murderer, seems to have grown out of an earlier obligation of the ablest of such relatives to compound the offence.

³ T.L.L., p. 15.

⁴ See also Smith's "Kinship and Marriage among the Early Arabs." Cf. also Kautilya's Artha Sastra: प्रासव्यवहाराणां विभागः अमासव्यवहाराणां द्वे विभक्तम् (VII, 5).

⁵ Koran, Chap. IV, v. 10.

It may however be noticed here that by a rule of Shiah law of inheritance the eldest son is exclusively entitled to his father's Koran and sword (Baillie's Digest, Part II, 279).

preferential claim based on seniority in age, though of course women always obtained a lesser share than the male inheritors of the same degree.

It thus appears that in the remotest ages, priority of birth did not necessarily involve any preferential proprietary right, and that, later on in a more developed stage of society, somehow or other, some proprietary privileges were attached to seniority in birth. It is said that "in the hypothetical state of primitive society, in which mother is the only fixed element in the family, there is no ground for giving precedence to the eldest child. Sons and daughters, on reaching maturity, pass into the cousinhood or clan in which their place is determined by other considerations than the order of their birth. The first genealogists did not care to go beyond the statement that a man's mother and his mother's brother were of a valiant stock. It is only when the family has been founded, that is to say, when the father and mother of a family are united for life to each other and their children, that the latter form a community within which degrees of precedence can be counted.¹ Before proceeding to trace the origin and development of these latter privileges it may not be altogether useless for us to examine the customs and usages prevailing among the typical retarded races of the present age. It may fairly be assumed that these retarded races only represent humanity whose civilisation has been somehow or other retarded, thus retaining some ancient customs which the civilised nations have dropped.

And for this let us first look into the household affairs of the Kafirs.² The Kafir-chiefs are reported to be despotic. If by the use of this term it is intended to imply that the will of the chief is the sole law of the nation, it is incorrect.

"The government is a sort of mixture of patriarchy and

A review of the customs and usages prevailing among the typical retarded races.

¹ Simcox, *Primitive Civilization*, Vol. I, p. 121.

² *Evol. Law*, Vol. I, 292.

feudalism. The principal check to the despotic inclination of a Kafir-chief is the existence of a very influential council of which the members are called 'Amapakati.' Even the private affairs of a Kafir² chief are governed by well-observed rules. By a very curious custom¹ prevailing among these Kafirs, they are often obliged to take plurality of wives. The positions of the sons depend much upon those of their respective mothers." The whole household of a Kafir will be divided into three establishments,² all his wives being attached to one or other of those establishments. The eldest son of each house inherits all the property which has been allotted by the father to that house. If the father omits, during his lifetime, to declare in a formal and public manner, what portion of his property he has allotted to his several establishments, he may be said to die intestate; in which case the eldest son of the 'Ibotwe' house takes possession, as the heir at law, of the whole of his father's estate and is bound to take charge of, and provide for, all his father's establishments.³ The chieftainship however always

¹ Evol. Law, Vol. I, p. 294.

² The establishment of the principal or great wife is called the Ibotwe. (She is not necessarily the first wife: on the contrary she will often be the last come.) The next in rank will be called the "right-hand" and third in rank, the left-hand house. If he has more than three wives, they will be attached to one or other of the three principal houses; but each of these minor houses will nevertheless have its own establishment. It is usual for the husband to apportion cattle to each of the three major houses but he seldom goes beyond this; hence the minor houses are generally dependent in this respect upon the major houses to which they are attached. (Evol. Law, Vol. I, p. 294).

³ Cf. Hindu Law: अथ एव तु दत्तव्यान् पित्रा धनमश्नेतः। शेषास्तस्यकीयेष्वयं पितरं तथा ॥ (Manu, IX.) Females, according to Kafir law, can inherit nothing but are themselves property. The purchase money of the girls is due to the eldest son of the house to which they belong (cf. Mahabharata; on Madri's marriage with Pandu *re* a custom prevailing in the kingdom of Madra. See also Gautama भगिनीयुक्तं सोदय्याचारः. See also a curious Russian custom noticed by M. Kovalevsky in his Ilchester Lectures for the

descended to the eldest son of a chief's great wife.¹ Besides these proprietary privileges, the eldest brother has, by a Kafir custom, the prior right to marry. The younger sons of a family are not competent to take wives while their eldest brother remains single.² The order of seniority however is not observed any further. The first-born, once settled in life, the rest may follow, as inclination and circumstances lead.³

The Fanti⁴ of the Gold Coast may be selected next for the purpose. The people are matrilineal,⁵ a Fanti family consisting of all the persons lineally descended through females from a common ancestress. The normal condition of a Fanti family is joint :⁶

The Fanti of the Gold Coast.

University of Oxford on "Modern customs and Ancient Laws of Russia." "The bridegroom," says Kovalevsky, "or the groomsmen asking to be allowed to take his seat, receives an answer that the brother is there to keep ward over his sister and that he will not consent to leave his seat unless he be paid for it. 'Dear brother, don't give me away for nothing. Ask a hundred roubles for me, for the veil which covers my head a thousand roubles. Ask for my beauty, God alone knows how much, etc.'" Note also the inferences drawn by the eminent scholar. As to Kafir law of inheritance in case of failure of male issue see Evolution of Law Series, Vol. I, p. 295. You must notice that the rule of primogeniture is followed even in collateral successions.

¹ Cf. Hindu Law on this point : Vedic name for such a son is ज्येष्ठपुत्रः.

² Cf. Hindu custom.

³ The early Sanskrit texts also go no further. Later on, however, seniority among other brothers also was taken into account.

⁴ Fanti Customary Law (Evol. Law, Vol. II, p. 326).

⁵ But not matriarchal.

⁶ Partition ordinarily takes place where two branches of one family, living in separate localities agree to relinquish to the other, all claim to whatever family property that has in its possession. Partition severs a man's connection with the family. (Cf. Hindu Law दत्तकपुत्रः कर्तव्यः। Besides partition there are other modes of severing one's connection with the family such as cutting 'Ekar' or 'Kahire,' adoption or commendation. See Evol. Law Series, I, Chap. XII, p. 326.

the whole family consisting of males and females constitutes a sort of corporation, the members of which are entitled to reside in the ancestral house and to enjoy that amount of influence and consideration which springs from their belonging to a family possessed of greater or less wealth. Each family has a head or 'Penin' or 'Egya.' On the demise of the head of a family the senior male member in the line of descent is, in the absence of any direction to the contrary, the Penin. In fact he is the paterfamilias of the family: the members are bound to obey him: and it is he who arranges the rooms in the family residence to be allotted to each and what portions of the family lands each is to cultivate or possess.¹ The Penin is usually one whose fitness had been recommended by his immediate predecessor and who had been confirmed in his position by all, or by the majority, of the principal members of the family.² From what has been said of the constitution of a Fanti family it may be expected that the idea of heirship scarcely presents itself to the mind of such people. The idea however is not totally absent. The people always recognize distinction between different kinds of property classifying it into movables and immovables; into ancestral, family and self-acquired; and it is in respect of the last class that they think of inheritance where the order of succession follows in certain cases the rule of primogeniture.³ As to the ancestral and family property no

¹ See Barnes *v.* Mayan, I. F. L. R. 180, and Halmond *v.* Daniel, I.F.L.R. 182, cited in *Evol. Law Series*, Vol. I, Chap. XII.

² Cf. analogous cases of succession to early Vedic Raj. See Macdonell and Keith's *Vedic Index*, notes on Rajan. See also Geldner's *Vedische Studien*, II, 203; Yaska, *Nirukta*, II, 10; *Rig-Veda*, X, 124, 8; X, 173; *Ath. Veda*, I, 9; III, 4; IV, 22. *Mahabharata*, *Yayati Upakhyan*. During the absence of a Penin, the eldest male member of the family acts in his place.

³ The order being (1) mother, (2) brothers according to seniority, (3) nephews (sisters' sons), (4) sisters, (5) sisters' daughters, (6) mother's brothers according to seniority or by election, (7) mother's sisters, etc.

question of heirship arises, the whole being under the management of the Penin as the administrative head of the family. There is however a class of ancestral property to which individual inheritance is the only rule. These are the properties attached to a public or political office; the right of inheritance to these depends much on the nature of the function of the office. In case of a captaincy (Tufuhin), for example, or other commanding position in a fighting force, no one can fill the post and consequently take the property left vacant without election. There is yet another class of property recognized by these Fanti people, I mean their clan land, the freehold in which always remains in the senior clansman for the time being in the locality. Property in these lands was originally acquired by the local clansmen clearing the virgin forest and afterwards setting it aside for the use of the clan. The plots of such lands may however be granted to members of the clan who may, if so desirous, build thereon.¹

The customs and usages of the Totemic tribes² next deserve our attention. Among the Arunta nation of the Totems every individual has property in his own personal chattels, weapons and implements of various kinds, and may, if he feel so disposed, give those away during his lifetime, though after his death only certain specified individuals shall inherit them.³ The Arunta law of inheritance, so far as these properties are concerned, does not disclose any vestige of primogeniture. These Arunta people however have a special kind of property, succession to which is governed by rules of primogeniture

The order is exactly what one would expect in a matrilineal family. *Of. Nair custom of Madras.* It is curious to note that primogeniture is not followed in case of female inheritors: अष्टना नास्ति हि ज्ञियः (Manu).

¹ Some such arrangement seems to have prevailed among our Vedic forefathers.

² Native Tribes of Central Australia (Baldwin Spencer. M. B. F. R. S.). See *Evol. Law*, Vol. I, 211..

³ *Ibid.* See 7. (*Evol. Law*, Vol. I, p. 234).

in its most modern sense. This class of property consists of sacred objects only of which Churinga¹ may specially be mentioned.² Though kept in the sacred store house of the local group under the charge of the headmen, these Churingas are somehow or other regarded as the property of the individual members, property which its owner can never personally possess, can never dispose of. "If the man has a son of mature age, then on the death of the parent the son will take charge of them—the eldest son, if there be more than one. If, however, the son be a mere boy, they are taken over by a younger brother of the dead man until such time as the son is mature. If there be no son at all they pass permanently into the brother's possession and will in due time descend to his eldest son.³ In the case of a female, though she may have a "churinga nanja" she is never allowed to see it and at her demise, it is handed over to a younger brother of her. In case she has no brother in blood her 'okima'⁴ or 'arungo'⁵ decides upon some tribal brother, younger than herself, to whom it is given. It may be mentioned here that among the Warra-munga nation of the Totems individual proprietary rights in the sacred ceremonies are not recognised: these belong to a group as a whole.⁶ The reason for this difference, as given by

¹ Or Tjurunga (Wundt, *Folk Psychology*, p. 117).

² The possession of Churinga is at present of real material value inasmuch as not only is there a considerable amount of repute associated with the possession of them, there is also this material advantage that young men who are shown such Churingas for the first time have to present the owner of them with an offering of food. First-showing of Churinga is an important ceremony among these Arunta people and takes place at their initiation ceremony. (*Native Tribes of Central Australia*, *Evol. Law*, Vol. I, pp. 223, 234.) See also Wundt, *Folk Psychology*, Tr. by Edward Leroy Schaub, p. 117.

³ *Ibid*, p. 234.

⁴ Father.

⁵ Grand-father.

⁶ *Evol. Law*, Vol. I, p. 235.

these Totems themselves, throw some light on their idea of heredity. The great ancestors of the Warramunga, they say, did not themselves perform the ceremonies, and hence their living representatives, who are no other than the spirit individuals of those ancestors now reincarnated, can have no individual association with or proprietary right in these sacred things and in the associated ceremonies.

We might recall here what Mateer¹ describes as "Primogeniture run mad." Mateer gives this name to the Malayalam Brahman system in which the eldest son alone is entitled to legal marriage. Barbosa's account says that, "they marry only once, and only the eldest brother has to be married, and of him is made a head of the family, like a sole heir by entail, and all the others remain bachelors and never marry. The eldest is heir of all the property."

These unearthed fossils of primeval ages belong to a strata only remotely akin to the modern formation. To understand the connection fully we must not overlook the gradual development of the idea of a human family and with it, and closely connected with it, the evolution of the idea of property. The modern institution of primogeniture is indeed a branch of the law of inheritance; and as such its history must be closely connected with the history of family and property. The law of inheritance must, by the very nature, take its shape from the constitution of the family and must also depend upon the

Primogeniture being a branch of the law of inheritance its history is closely connected with the history of the family constitution and of the property.

nature of the property, since it professes to effect a transfer of the estate and appears only when the family is decomposed into its elements. If in primitive times property belonged to the community, succession would only represent the absorbing right of such community. The right of the community would prevail in such times and the individual would be entirely absorbed by

¹ Native Life in Travancore, p. 170.

the collective entity and would lose his personality. Testacy, the act of an individual, would necessarily be unknown in such a time.¹ If however, there be any time when the family or community would be denied altogether and the individual would have an untrammelled right to decide upon his own duties, there would be no laws of intestacy and testamentary inheritance would cover everything.

Property, as has already been said, is subject to evolution and as such has a history, a history intimately connected with the history of the family. In its last analysis a history of property will be the history of human nature itself, because, says

Property is subject to evolution.

¹ See Bigelow on "The Rise of the English Will" (Anglo-American Legal History Series, Vol. III, p. 770). There may however develop a Law of Testacy in a community where the individual still occupies a secondary position. See "The Mediaeval Law of Intestacy" by Charles Gross (Anglo-American Legal History Series, Vol. III, p. 723). During the middle ages the last will was usually the epilogue of the last confession. The intestate was regarded with horror as an infamous person who had died unconfessed. The intestate could not be buried in consecrated soil, as he died without providing for his salvation. See also Pollock and Maitland, Bk. II, Ch. VI, 84. Traces of true testacy are nowhere found in our ancient literature, and the single instance of such an attempt that I have been able to trace out is the passage speaking of the disposition of all the belongings of the Angiras in favour of Navanedisto occurring in Oitareya Brahmana, which failed to produce the desired effect. Rigveda, III, 49, 4, may also refer to a will: it seems to import an idea similar to that conveyed in the Roman maxim: *uti legasit suae rei ita jus esto*. But see also III, 45, 4; I, 116, 3 which would imply *donatio mortis causa*. At Athens there was not testacy until the times of Solon; and that which was then legalised was so partial in its operation as can only be named a merely "inchoate" testament. A striking passage in the laws of Plato attests the prejudice experienced by the ancient promulgators of codes against any claim to a posthumous control over landed property. See Plato, Legg. XI, Grotto Plato, Vol. III, 435-436. At Rome, it is true, the case at first

Miraglia,¹ "property is freedom applied to things² and freedom is nothing but ownership of self." "In all manifestations of human activity progress is the divergence from the simple to the complex, from formless homogeneity to varied heterogeneity,

sight appears to have been different. But see controversy round the maxim "*uti legasit super pacunia tutelave suae rei ita jus esto.*"—There is one view that the maxim is only fragmentary and had previously contained some such clause as "*si cui nulli sint liberi.*" This would protect the rights of the children.

¹ Miraglia, *Comparative Legal Philosophy* (Modern Legal Philosophy Series, Vol. III).

² According to Locke and his followers labour is the basis of property—Locke's *Civil Government*, Ch. IV. M. Roder in his *Die Grundzuge der Naturrechts*, § 79, remarks that labour establishes between man and the objects which he has transformed, a far closer connection than mere occupation. Labour creates value: accordingly it seems just that he who has given birth to it, should also enjoy it. M. Thiers says, "To every one for his labour, because of his labour and in proportion to his labour." No legislation however ever allowed that labour or specification was alone a sufficient title to establish property. M. Renouard says (*Du Droit Industrial*, p. 269), "If labour alone conferred a legitimate ownership logic would demand that so much of the material produced as exceeds the remuneration of such labour, should be regarded as not duly acquired." Laveleye in his treatise "*De la Propriete et ses Formes Primitives*" contends that if labour were the only legitimate source of property it would follow that a society, in which so many labourers live in poverty and so many idlers in opulence, is contrary to all right and a violation of the true foundation of property. The theory would therefore mean a condemnation of all the modern organization. According to Kant specification creates a provisional ownership, which only becomes final by the consent of all the members of the society. Many writers of very different shades have maintained that property is the creature of law. "Banish government," says Bossuet, "and the earth and all its fruits are as much the common property of all mankind as the air and the light..." Montesquieu (*Esprit des lois*, XXVI, c. 15) uses nearly the same language. Mirabeau announced that private property is acquired by virtue of law. Property, according to Robespierre, is the right to enjoyment guaranteed by law. Bentham is of opinion

accompanied by the greatest similarity and profoundest correlations of parts and by constantly increasing perfection of attributes." Our¹

Vedic conception of evolution.

Vedic Rishis expressed this conception of progress by saying that from the one and from the whole, before the existence of any subdivisions of the great unit, there came a division and separation of parts which tend to develop into one distinct and concrete unit or whole developed to its fullness, a harmonic synthesis very different from the original and embryonic synthesis.² The human community was at first one in which the individual was only a part and instrument ; then he developed concrete individuality,³ trying to free himself from society, and tending

that property and law were born together. Before law there was no property ; banish law, and all property ceases. Cf. Hindu theory of property—Mitakshara. Others contend that the notion of property must precede the law. According to Roscher, Mill and Courcelle human nature is such as to require property : *Ihering* in his own way says that the purpose of life's maintenance produced property, and traces the origin of property to human concern for the coming days called forth by bitter experience. Property then is the result of efforts directed not merely to the acquisition of momentary need but to the acquisition and storing up of means of support not needed until the future.

¹ Miragila, p. 403.

² See Rigveda : अत्राय नामावध्यैकमर्पितं यजिन् विश्वानि भुवनानि तस्यः । (X, 82, 6). See also I, 67, 3. Again : आनोदवानं सधया तदेकं तस्याहन्तत् न परः किं च नाह (X, 129, 2). Also : नाहदावीन्द्रोसदावीन्द्रानीं नावीन्द्रजो नो व्योमा परा यत्किमावरी वः कुहकस्य यमंनमः किमासीत् गङ्गा गभीरम् ॥ (X, 129, 1). See also Rigveda X, 129, 3 ; X, 129, 4 ; X, 31, 7 ; X, 31, 8.

³ Kohler says, " the course of humanity's development from the beginning has been this : first mankind acts in groups; the individual being absorbed in such a group ; the law is the law of the group, not of the individual ; the group is the guiding power ; labours and amusements are shared in common, and it is not the individual that thinks but the group. Hence institutions are produced like group-marriage, communal property and common labour. In this

to reach a rational harmony between his particular determination and the social.

Such is also the evolution of property. Being at first collective, it becomes individual and egoistic and finally tends to take its place in society and the state.¹ It will be beyond our purpose to enter into the controversy as to whether "the collective property of our remote ancestors was the effect of a sense of justice or an instinctive affirmation of the natural rights of man and the conception of equality,"² or whether "it was only the consequence of two necessities, one a natural development, the other, a product of social state."³ Nor is it necessary for us here to enter afresh into the controversy as to whether the progress of property has been from the communal to the individual, or whether collective property is only the extension of individual property to a family more or less large. The dispute seems to be over and it is now generally believed that property in land was at first collective⁴ and that private ownership was first recognized only in the products of labour.

way only mankind can resist its enemies and wring enough out of nature to preserve what it already has with the scantiest development of cultural means. To what extent the individual is absorbed in the group is shown by the fact that to be thrust out of the community is the worst evil that can befall a man." In proceeding to assign reason why the history of the world had to begin with collectivism, Kohler says that the enemies of man were so many that only strong cohesion could overcome the dangers that threatened him. *Cf.* Oit. Br., IV, 8: ते देवा अविमयुरजानं विप्रेनाचमखिदमसुरा आभविष्यन्तीति ते व्युत्क्रव्यामन्मयन् . See also Sat. Br., I, 1, 1.

¹ Miraglia, 404. Beldt places individual property first. For a criticism of Belot's view, see Miraglia, p. 418; see also Maine, *Anc. Law*.

² Laveleye, *Primitive Property*.

³ This is Belot's view. See note 15.

⁴ See "Modern Customs and Ancient Law of Russia" by M. Kovalevsky and "Russia, Political and Social" by Tikhomirov—the chapter on Russian Mir; land in central Africa belongs to community; in Java the owner of soil is God, the Dessa or community has the use.

"It can no longer be doubted," says Miraglia, "that in India, before the system of caste, property was collective. God gave the land to men for their enjoyment simply. They had no existence apart from the life of the tribe or family." When caste was introduced, the Brahmans considered that God had given them the land which they allowed others to use."¹

In Peru the property is governed by a system of patriarchal and authoritative communism. The system of communism is still in full force among the aboriginal tribes of India. Indian village communities certainly point to collective property in land. See also the village communities in certain provinces of Spain, Altmarck, Ancient Scandinavia, Denmark and Jutland as also among the acient Britons and Afghans.

¹ Miraglia, p. 406. Cf. also the Hebrew legends. As a result of the theory that it was their gods who gave all wealth these Vedic Aryans declined to recognize any proprietary rights of the aborigines Cf. किं ते ब्रह्मन्ति कौकटेषु गोवोनाशिरं दुर्द्धेनतपन्ति धर्मम् । अनोभर प्रमगन्दस्य वेदो नैवाशास्यं सधवन्प्रशयान (Rigveda, III, 53, 14) ; Sat. Br., VI, 1, 2, 25. But the saying "surely the bricks possessed of prayers are the nobility and the space filers are the peasants ; and the noble is the feeder and the peasantry is the food," indicates (S. B. E., Vol. XLI, p. 153) a sort of feudalism prevailing in India in these early days. Baden Powell (in his Indian Village Community, p. 190) urges that the Vedic Aryans were landholding aristocracy superimposed upon an agricultural aboriginal stock. But, without ignoring the possibility that the Dravidians were agriculturists, there is no reason to deny that the Aryans were so likewise. The Vaisyas of these Aryans took to agriculture, or rather the members of these Aryans that took to agriculture became later on Vaisyas. In fact their Vedic name 'Vis' denotes people. In Oit. Br., VII, 29, the Vaisya is described as अन्वस्य बलवन्तः, अन्वसाय, यथाकामं जेय, etc. Their superior lords were Rajanyas, cf. तन्नात् राजन्वेनाध्यक्षेण वैश्यम् धत्ति (Kath. Sam., XXVII, 4). This points to Ksatriya, and not Brahmana, as the caste theoretically overlord of the lands. (Cf. also ब्राह्मणो राजन्वो वैश्यो दोक्षिश्मणः अविधं देवयजनं योचति ।—Oit. Br., XXXIV, 2.) These Ksatriyas however were far from the real proprietors. Cf. "Yama is the Ksatra and the fathers are the clansmen ; and to whomsoever the Ksatriya with the approval of the clan, grants a settlement, that settlement is properly given."—Sat. Br., VII, 1, 1, 4. S. B. E., XLI, p. 299. See also later.

A detailed examination of the real worth of this statement must be reserved for a later chapter. All that should be noted here is that collective property in India seems to have been an institution of the pre-Vedic age or at least of an age preceding the composition of the Smritis. "The vast continent of India may be said to establish an epitome of all possible forms of ownership, from the corporate property of the village community to the absolutely private property of the individual. In those parts of India where the Smritis were composed, the common enjoyment by the village community of pasture-ground for cattle appears to have been still in vogue ; but the arable land was already held in severalty. The owner of a field is often referred to in the Smritis, and everything which is said about his position and rights, *e.g.*, about his claim to damages for trespasses on his ground and about the decision of boundary disputes between two landowners, shows him possessed of all the substantial attributes of independent ownership."¹ This is an extract from an eminent author who supports his opinion by all possible authorities. As to the Vedic age it may be noted that there are in the Rigveda² ample evidence of the existence of separate fields and there are passages³ which may possibly refer to individual occupation of them.⁴ The word 'ksetra' as used in the Rigveda clearly points to the existence of such fields carefully measured off,⁴ though in some passages it means simply cultivated land. In the

Vedic indications
of individual pro-
perty.

¹ Jolly, *G. L. L.*, V., pp. 88, 89.

² दध्नश्चिन्मन्त्रं च पूरुहंत ऐवैष्टेता वृषिभ्यां भवामि वहीत ! सन्तु क्षेत्रं सखिभिः त्रिवरोभिः सन्तु मूर्ध्नि सनदपुंसु वज्रः ॥ (I, 100, 18), क्षेत्रमिव विमनुसां जनेन एकं पात्रसमवी जेहमानम् । (I, 110, 5), See also III, 31, 15 ; IV, 18, 5 ; IV, 41, 6 ; V, 31, 4 ; V, 33, 4 ; V², 25, 4 ; VI, 28, 2 ; VIII, 91, 5 ; X, 33, 6 ; X, 50, 3 ; IX, 85, 4 ; IX, 91, 6 ; etc.

³ See Rigveda VIII, 91, 5, where Apala invokes Indra to make her father's head, his field and her uterus productive.

⁴ See above I, 110, 5.

Atharvaveda and ¹ later the ² sense of a separate field is clearly marked. Then again we have the words 'khila' ³ and 'khilya' ⁴ denoting waste lands lying between cultivated fields and consequently implying the existence of separate fields. These separate fields are sometimes designated 'urbara' and there ⁵ are passages in the Rigveda where a father's urbara is likened to his head. ⁶ These fields are often spoken of in the same connection with children, ⁷ and there are passages ⁸ that speak of individual disputes over them. There are, besides, passages in later Vedic literature which give us lists of property belonging to a man, and such lists contain fields and houses. ⁹ The precise nature of the right, of course, cannot be determined from these texts; and before anything is said of the exact nature of such rights we must be sure of the legal relationship existing between the head of a family and its members.

Vedic family organisation.

Such relationship is nowhere explained in the Vedic literature and can only be conjectured. There are texts that would seem to refer to extensive right of the father over the person and property of his

¹ IV. 18, 5; V. 31, 4; X. 1, 18; XI. 1, 22, etc., etc.

² Tait. Sam. II, 2, 1, 2; Chh. Up. VII, 24, 2, etc., etc.

³ Ath. Veda VII, 115, 4; Sat. Br. VII, 3, 4, 1.

⁴ Rigveda VI. 28, 2; X. 142, 5. Pischel thinks that the meaning intended broad lands used for the pasturing of the cattle of the community. Oldenberg points out that the same is rather the land which lay between cultivated fields. Sayana takes खिलम् to mean अप्रतिष्ठत् स्थानं.

⁵ Rigveda I, 127, 6; IV. 41, 6; V. 33, 4; VI. 25, 4; p. 50, 3; X. 142, 3; Ath. Veda X. 6, 33; 10, 8; XIV. 2, 14, etc., etc.

⁶ See above, Rigveda VIII. 91, 5.

⁷ तौ हि ते तनय उर्वरासु सुरोदयोर्विद्वन्मयौ पौत्रौ ।

इन्द्राक्षौ च च वदन्त्या स्मातामवीभिर्देवा परितक्मप्यायाम् ॥ (Rigveda IV, 41, 6.)

⁸ मूढो वा मूढं वनते यदोरैरानूडया तद्वि यत् कर्त्तव्येति । तौ वै वा गोषु तनये यदसु विकन्दसौ उर्वरासु ब्रूयते ॥ (Rigveda VI, 25, 4.)

⁹ See Chh. Up. VII, 24, 2.

son.¹ He had, it seems, absolute power over his children, and could, if he so desired, sell them. A son moreover seems to have been incapable of acquiring any property for himself,² and any injury done to him would, it seems, be an injury to the father.³ A further detailed enquiry into the question will be out of place here in this preliminary survey, and must therefore be deferred for some time. Meanwhile it may be inferred from all that has been said that a Vedic father seems to have a sort of individual ownership in the family property subject perhaps to some relative rights of its subordinate members.⁴

Vedic village and tribal communities. There are ample references to village and tribal communities in the Vedic literature⁵; but it is very difficult to appraise the exact relations subsisting between these several institutions.⁶ Nor is it easy to give any definite account of the system of land-tenure prevailing in Vedic India. An

¹ यत् वेदान् हव्ये चक्षुः दानव्यजानं तं पितामहं चकार । (Rigveda I. 116, 16). From this statement Zimmer (Alt indisches Leben, 316) infers the existence of a developed *Patria potestas*. But to lay stress on this isolated semi-mythical passage would be unwise. See also story of Sunasepha (Oit. Br. 33, 3) and also X, 85, 32, Story of Sunasepha, Oit. Br. 33, 3; from the same it appears that a father lost such power at a certain stage as did Harischandra over Rohita.

² See X, 85, 31, etc.; I. 126, 3.

³ See above, Rigveda VI. 25, 4; also VI. 25, 6; etc., etc.

⁴ As to the possibility of coexistence of these two kinds of rights see *ante*.

⁵ Rigveda X. 62, 11, X. 107, 5; VI. 2, 7; Sat. Br. VII. 1, 1, 4, etc., etc.

⁶ But see Sat. Br. (S. B. E. III, p. 110), where the following are named in descending order of authority: (1) King, (2) King's brother, (3) Suta or Governor of a Province, (4) Gramani, (5) a tribesman. This Gramani seems to have been an officer of the king in Vedic age holding his office by King's appointment. He is mentioned as one of the officer's of the king (Tait. Sam. I, 8, 9, 1; in Tait. Br. I, 7, 3, 1; in Sat. Br. V. 3, 1, 1) and is one of the eight "viras" forming the royal entourage. (See Panch. Br. XIX, 1, 4.)

attempt will be made in a subsequent chapter to examine the question as to how far the individual or the family was recognized as owner of landed property. That the homestead lands stood on a different footing from agricultural fields and pastoral grounds seems sufficiently certain.¹

It has already been intimated that while property belonged to the community, succession would only represent the absorbing right of the family. How this may contain the real germ of primogeniture will be adverted to later on. Before proceeding to that, it seems necessary briefly to consider the reason which, in early times, produced the strict connection

The strict connection between the family and the property. between the family and the property, and which so constantly relegated the actual

possessor to a position little superior to that of a life-tenant. It is indeed only from an examination of this point that we are able to comprehend the important privileges which, notwithstanding all that has been said, was undoubtedly attached to the position of the eldest son. The answer to the question must necessarily depend on the solution which we prefer to accept of another and far wider problem, to which only the slightest and most cursory allusion can here be made. What was the tie that bound the ancient family together? Two conflicting answers to this question have been suggested, both of which appear to contain a certain amount of truth, while at the same time each hypothesis has been unduly pushed too far to account for phenomena which may be best explained by its rival theory. According to the view of

Maine's theory. which Sir H. Maine is the chief exponent, the reply is very simple. Society, according to him, was based on consanguinity, because in its earlier stages there was no other bond by which it could possibly be held together. The rules by which authority was maintained,

¹ नृवत्तिस्त्रये वा व्यचक्षन्ता यदि वित्तम सैते । (Rigveda) VI. 25, 6. चादस्यायुर्धनञ्च
वहीषु धर्मेन दूनवे ॥ (Rigveda I, 127, 5).

property administered, and its devolution regulated, in the joint undivided family, the village community, the sept, the tribe, and the archaic state, existed because they were emphatically natural, and because it could not possibly have occurred to those who framed and obeyed them to frame and obey laws of any other kind.¹

The counter theory finds its most complete exposition in M. Fustel de Coulanges' "Ancient city." According to Coulanges, ancient family was knit together exclusively by the influence of a religious feeling, or as we might say, of a superstition of the grossest kind. He thus explains the tenacity with which it resisted all modifications from without and its comparative inaccessibility to the solvent influence of civic life.² The superstition referred to consisted in the belief that the dead ancestor of the family still lived somewhere, that his comfort and well-being depended on the assiduity with which his material wants were gratified by his descendants, and that he was able and inclined, if neglected or despised, to exercise a malign influence on the future prosperity of his house.³

¹ This view of Sir H. Maine is substantially the same as that adopted by Aristotle in the opening chapter of his Politics.

² See also Cox's History of Greece, Vol. I, Chap. II, pp. 10-16.

³ Such was the belief of our Vedic forefathers: they believed that when they performed the Yajnas the manes of their ancestors came to seat themselves beside them and took nourishment which was offered them. Cf. *आग्ने याहि सुविद्वन्मिरवाङ् सत्यैः कव्यैः पितृभिर्भर्तृभिः ।* (Rigveda X. 15, 9); also *अवन्तु मा पितरो देवहृती* (Rigveda VI. 52. 4) *मीषूषो अथ जुडुरन्त देवाना पूर्वं अग्ने पितरः पदभ्याः ।* पुराण्योः सन्नमोः कृतुरन्तर्हृद्देवानामसुरत्वमेकम् ॥ (III. 55, 2). See also Rigveda I. 110, 1 and 2; IV, 35, 8; etc., etc. According to Chh. Up., "The spirits go to the world of the fathers, thence to the ether and thence again to the Moon." Having dwelt there till their good works are consumed, they return again that way as they came" *पितृबीजादाकावद् आकाशात् चन्द्रमसम्, etc.* (Ch. Up. V, X, 4). The necessity for food in the after-life becomes more and more felt till this food the fathers make

It is useless to enter into a discussion as to the relative worth of these two rival theories. Still one must say that what may aptly be called the religious theory undoubtedly constitutes one of the many valuable contributions to our knowledge of the early history of institutions. The earliest form of religious rites evidently took the shape of a worship of the dead,¹ which their lineal descendants were bound to scrupulously maintain; and which could not be offered without gross impiety by any but the scion of the house.² Hence, if not entirely, at least in great measure, arose the importance universally attached to the preservation of the continuity of the family, the violent prejudice entertained against the alienation of its hereditary land, and the heavy penalties with which Hindu, Greek and Roman law agreed in visiting the removal of ancient boundaries. Between the gods and the soil these people of the early ages saw a mysterious relation; and the family, which, through duty to ancestors and religion, remained grouped around its altar, was as much fixed to the soil as the altar itself. The right of property was established for the accomplishment of a hereditary worship, and it does not therefore fail after the short life of an individual, but continues with the continuance of the domestic religion, and descends to one who is to continue the religion.³ The property, according to our Vedic forefathers

their 'lives' sustainer (Ath. Veda VIII, X, 23). For the prevalence of such belief in Japan see "The Story of Japan" by Dr. Murray, p. 59; *cf.* also the Chinese custom.

¹ For ancestor worship among the Vedic Aryans see Rigveda I, 100, 1 and 2; III. 31, 2; VI, 33, 1; VI, 52, 4; *X, 15, 9; X, 40, 101, etc., etc. Ath. veda VIII, X, 19 and 23; XVIII, 49; Sat. Br. II. VI. I. 34 and 36, etc., etc.

² *cf.* the Chinese custom of worship in the ancestral hall. See also their worship of the ancestral tablet. See also Anc. City, p. 108, Athenian custom of eldest son's receiving the household goods as forming special share of inheritance.

³ Anc. City, Chap. VI.

arose for yajnas,¹ and if any person left a son behind, such son had to perform these yajnas wherein his deceased ancestors would be offered repasts.² Hence, too, may be best explained the absence, in the earliest times, of all conception of testamentary power,³ and the rigorous refusal of permission to dispose of by will the paternal estate even when the increasing value and quantity of other kinds of property had engendered a liberty of bequest therein. Hence, too, and hence alone, we can understand the real meaning of those *sacra* which still form a material part of the law of succession to a Hindu's estate, and which at Rome became in time so burdensome that the juris-consults of the age of Cicero found no more fertile field for their ingenuity than in devising methods of conveyance which should separate them from the soil and elude their obligation.

If then the continuity of the family and the maintenance of its ancestral rites practically formed the basis of archaic society on which the whole superstructure was gradually raised, it will become equally evident that its continuity, all-important as it was, could not possibly be maintained for any length of time without some such device as primogeniture. As long as a family was an independent institution, and even after a state has grown up around it, so long as the family maintained its distinctive character of an 'Imperium in imperio,' it must have always had a single head, who was at once its law-giver and its priest.⁴ He was also the sole administrator of the ancestral property. His position, of course, was far from that of a genuine owner. His character, in fact, was essentially

Primogenitus probably first appears as a mere manager.

¹ Cf. Rigveda देवतातथैरयिः, etc., in I. 127, 9.

² Rigveda III, 3, 2; 33, 1; 40, 10, etc., etc.

³ But see *post*, note 9.

⁴ Cf. Prof. Sarvadhikari's Hindu Law (T. L. L.) (Second Ed.), p. 176: Primogeniture represented the claims of communism, and the principle of equal distribution represented those of individuality..

See also Dr. Hearn, p. 81.

representative ; and doubtless he knew no indulgences and opportunities for enjoyment denied to members of the household. He administered to the common fund for the equal benefit of all, living and departed. To strangers, perhaps, he alone was responsible for the misdeeds of his kinsfolk.¹ On the death of such an elder, his place was obviously not susceptible of joint occupancy and must have devolved on the eldest and ordinarily the ablest of the survivors.

We might here refer to the Malayalam system of " Primogeniture run mad " already noticed. The point, which mere observation from outside fails to clear up, is, in what sense property can be said to pass to sisters' sons in communities in which family property is held jointly. The Malayalis are litigious, and the chief character in their law-suits is the Karnavan. It is possible that if we could unravel the past history of this personage for the last four thousand years, we might find in it the key to all the idiosyncracies of Egyptian marriage law. The Karnavan is simply the senior member of the Malabar family community, the administrator of the family property, and the natural guardian of every member within the family group. The property is vested in the Karnavan for the common good of all and is indivisible.²

It is clear from the above that the inheritor, whether a primogenitus or not, in such an age, is far from the absolute owner of the property. The historical development of the laws of inheritance, as has already been said, is intimately connected with the evolution of property and of the family. It cannot be doubted that the principle of intestate succession lies greatly in consanguinity, or in that ethical organism of the family which shows itself by a community of goods. When the family

His position is not
that of an absolute
owner.

¹ Cf. the authority and function of a Russian 'Bolschak,' and a Servian 'Domachin.' See Kovalevsky's *Modern Custom*, etc.

² Mayne, § 264.

becomes certain and establishes itself in certain places, its definiteness prompts its members to the cultivation of land, and later makes the beginning of ownership which appears as a collection of means suitable for the preservation and development of that collective body. Ownership in a family undergoes modification according to the nature and purpose of the family itself, which is an interpenetration of persons, a communion of sentiments, affections, ideas, and wills. There cannot, in such a state of things, fail to be co-ownership. In every age and country the members of the conjugal and domestic societies have attempted to make assignments of family goods upon the death of one of them, and have thought themselves injured if a stranger took possession of any. The sons, participators in the community, did not acquire new right upon the death of the father, but merely obtained greater freedom in the administration of the goods of the family.¹ The inalienability of family goods is the principle of all primitive laws which always regard the entity and not the individual as the subject. Such a form of co-ownership is a 'communio pro indiviso' in which the co-owner has an equal right to individual ownership on the "pars pro diviso," and where the family is an unequal society with superiors and inferiors, the inequality does not render co-ownership impossible,² but only makes the different members enjoy an unequal property right as in our Mitakshara family.

¹ Miraglia, *Comparative Legal Philosophy*, p. 745 (*Modern Legal Philosophy Series*, Vol. III).

² Cf. Rani Sartaj Kumari *vs.* Rani Deoraj Kumari (L. R. 15 I. A. 51): "It must be conceded that the complete rights of ordinary coparcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are immersed in or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

This however is different from another form of co-ownership which may be termed 'domestic co-ownership' and which presupposes the distinction between relative and absolute property. "It is founded on the full and absolute right of the father,* head, governor and representative* of the family, and on the relative rights of its members,* who have a right conditioned upon the death of the father. Whoever has a full property right in something over which another person has a relative right, can use and consume the thing to a definite and reasonable extent. If there is co-ownership between him who has full right and him who has a relative right, the first must use it for the purpose of co-ownership and society. The nature of the relative property being what it is, and this right of property not being limited except in relation to a full owner, it follows that the relative owner has a right above all other persons to its use and control; and that upon the death of the full owner these goods become his absolutely. From this rises the right of the relative owner to demand that the property be so placed that at the death of the full owner they can be distinguished so that he may succeed to all his property." ¹

Various have been the theories as to the original idea of inheritance. If the theory that "the purpose of life's maintenance produced property" ² contain the least grain of truth, and if we remember how belief in the after-life existence, in which the departed would have all human passions and wants, and would require material help from the survivors on earth for the satisfaction of these wants, was once as wide as the earth itself, it may not be very difficult to understand that law in such a state of things could not consistently have refrained from taking steps to ensure provisions for this major part of one's existence.

¹ Miraglia, *Comparative Legal Philosophy*, Chapter XXI, p. 712.

² Ihering.

It would be the bounden duty on the part of every family to see to the comforts and happiness of its departed members no less than that of the living ones.¹ Gradually of course, when the community grew large, the entire body of the kins of a departed soul might not feel equally concerned with his affairs. His nearer and dearer ones will naturally be more solicitous about his after-life comforts than the more distant relations. Any special exertion on their part towards making provision for their departed ancestors would be looked upon with praise by all.² This would gradually develop a duty in them specially to see to the welfare of these departed. The fulfilment of such a duty would necessarily be onerous and involve much exertion on the part of such relative or relatives. In such a state of things, it is hardly difficult to understand how privileges by way of reward and recompense would gradually cluster round this onerous duty, and would, in time, grow into rights which would survive that superstitious sense of duty that might drop off with advanced culture.

Still what was the origin of primogeniture in its present form? Primogeniture in primeval ages, which we had been so long discussing, was undoubtedly very different from what we have at present. The instances that have already passed under review mostly indicate that, probably "originating from a sense of convenience, the eldest sons were sometimes accredited with certain religious and political distinctions which other children did not receive." The question is admittedly very obscure. Sometimes the rights or duties of an eldest son partook of the nature of domestic customs; he was domestic high priest, domestic chief and political representative of the family. Sometimes the private capacity of an eldest son was almost insensibly merged in his public importance. In most

Origin of modern
primogeniture.

¹ See Coulanges, *Ancient City*, Chapter VI.

² This can be best illustrated from the social life of the Chinese.

cases he succeeded to the entire family estate only as its manager and nothing more. And later when partition became common, we find him taking special shares ; but before that he had been saddled with onerous duties, and these special shares came to him only by way of recompense. Sometimes we see him earning his special shares and position by discharging some special duty entrusted to him. Such a position of the eldest son is apparently at the opposite pole of his position at the present age. The modern law of primogeniture means, as has already been stated, the devolving of the entire estate on the eldest son simply because he is the eldest, and such a son takes as owner and for himself, not as mere manager and for others.

Sir Henry Maine draws a marked distinction between the domestic rights of the eldest son which had their mainspring

Maine traces modern primogeniture to the public position of the eldest son in the ancient world,

in archaic customs, and his public position which involved succession to the headship of the tribe, and embodied the continuity of the chieftain's power ; and thinks that it

is only to the latter that modern primogeniture—exclusive succession to property by the eldest son—can, with any probability, be traced.¹ He finds in feudalism a solution of the very obscure difficulty as to the origin of modern primogeniture

and in Feudalism finds a solution of the question as to its origin.

“The Key,” he says,² “which unlocks this difficulty has rarely been seized by the writers who occupy themselves in tracing the genealogy of feudalism. They perceive the material of the feudal institutions but they miss the cement.” The solution suggested by Sir H. Maine may be true for modern Europe, and Pollock indeed would have the same story told of English primogeniture³: “The various customs of inheritance,”

¹ Early. Hist. Inst., 198.

² Anc. Law, 237-239.

³ See Select Essays in Anglo-American Legal History, Vol. I, p. 106.

Pollock says, "that are to be found even to this day in English copy-holds and to a limited extent in free-hold land, and which are certainly of great antiquity, bear sufficient witness that at least as much variety was to be found before the conquest. Probably the least usual of the typical customs was primogeniture; preference of the youngest son, ultimogeniture or junior right, as recent authors have called it, the Borough English of our post-Norman books, was common in some parts; preference of the youngest daughter¹ in default of sons, or even of the youngest among collateral heirs was not unknown. But the prevailing type was equal division among sons, not among children including daughters on an equal footing as modern systems have it. Here again the effect of the Norman conquest was to arrest or divert the native lines of growth. In this country we now live under laws of succession derived in part from the military needs of western Europe in the early middle ages, and in part from the cosmopolitan legislation of Justinian."² In India, however, where the legal maxims of Rome had no action in dissolving and re-constituting the elements of the subject the question still awaits a solution. There are moreover countries like Russia³ where the introduction of the law of primogeniture had been attempted only in modern times by the legislature.

It has been noticed above that Sir H. Maine thinks that modern primogeniture may probably be traced to the early public position of the eldest son which involved succession to

¹ Cf. Hindu law, दुहितृवाक्यप्रमाणप्रतिष्ठितानाम् (from which would often follow the same practical result.)

² Pollock on English law before the Norman conquest, *ibid.* See also "The Law and Custom of Primogeniture" by the Hon'ble George C. Brodrick, Chap. I, p. 95. But see Prof. Maitland's collected papers, Vol. I, p. 175, where he is indignant at the very suggestion of feudal origin of the institution.

See also Pollock and Maitland, "History of English Law."

³ Russia, Political and Social, by Tikhomirov, Book IV, Ch. III.

headship of the tribe, and embodied the continuity of the chieftain's power. You must not however take him to mean that the early chieftainships always descended to the eldest son of the deceased chief as a matter of right. It will indeed be incorrect to say that early headships were always hereditary : on the contrary it is natural to expect that it was at first only elective.

Succession to early
Headship.

It was so elective in early Russia. The old Russian Folkmote was competent to choose the chief ruler of the country.¹ This right of election of the Folkmote seems early to have been restricted in many ways. The little definite information which has come down to us only shows that even at that time, the powerful chief had so managed that the right of election which Folkmotes exercised had to be kept confined to certain families.²

Headships not al-
ways hereditary, but
elective.

The Folkmote was of course free to pronounce in favour of a younger member of that family, notwithstanding the candidature of an elder one of the same. It will indeed be interesting to note here how the chiefs of the principalities of the North-east Russia early managed to make their chieftainship hereditary. In the principalities of Sousdal and of Raisan the dukes early eluded this election handicap by associating their successors, ordinarily their eldest sons, during their life-times, in the exercise of sovereign powers.³ The sons were thus practically installed in power before the time for these elections came, and generally had no difficulty in getting elected. This developed a custom by which the right of election of the people gradually dwindled into a mere right of ratification.

Devices to elude
the election handi-
cap.

¹ Kovalevsky, Ilchester, lecture, 1889-1890 (Oxford University), Lect. IV, Old Russian Folkmotes.

² *E.g.*, Family of Rurik.

³ Kovalevsky, p. 146.

As time went on even the last vestiges of this right disappeared and the chieftainship became completely hereditary. Following the same principle the famous Ieyasu of Japan, while still in power retired in favour of his third son Hidetada in 1605 to ensure securing the same for his son before his death and thus to make the office hereditary.¹ Our Vedic literature also supplies ample evidence from which we may fairly conclude that the early chieftainships were elective.²

Vedic elective chieftainship.

There are indeed texts in the Vedas which would go to point to hereditary monarchies as they narrate cases where the descent can be traced.³ The terms like दशपुत्रवम् राज्यम् would also imply the same thing.⁴ Yet in others, as has been shown by Zimmer,⁵ the monarchy was elective, though it is not clear whether the election by the people was confined to members of the royal family only, or extended to all the members of the noble clan. Geldner⁶ indeed argues that all the passages that can be cited in support of the view of elective monarchy are at least evidence of mere acceptance by the people of a monarch who had already succeeded to the throne. But in view of what has been said of Russia it is not hard to see that this ratification by the people is only a survival

Geldner's views examined.

¹ The Story of Japan, Dr. David Murray, Ph.D., LL.D., Chap. XII, "Feudalism in Japan," p. 290.

² Rigveda (X. 124, 8) also X. 173; Ath. veda I, 9; III. 4; IV, 22; Ait. Br. I. 14. Mahabharat.

Of. Yaśka, Nirukta II, 10: Where we find an example of selecting one member of the family to the exclusion of another as better qualified. Of the Kuru brothers Davaki and Santanu, the Younger Santanu was selected king, Davaki being his priest.

³ *E.g.*, in cases of वज्राह, दिवीदाह, पित्रिपत्न, सुदाह, पुत्रकुत्स, वसुदेव, मित्रातिथि, कुत्स, श्रवण, उपनयनम् ।

⁴ Sat. Br. XII, 9, 3, 3; V, 4, 2, 8; also Ait. Br. VII, 12, 17.

⁵ All indischeliben, p. 162.

⁶ Geldner, Vedische studien, II, 203.

of an earlier fuller right of election. This is indeed something more than a mere conjecture based on an analogy drawn from a people quite differently circumstanced. You will recognise the force of this argument when you will remember that in

The Indian institution of Yuvaraj, its significance. India too the institution of Yuvaraj developed early;—an institution, exactly similar to that

whereby the eldest son of a Russian chief was associated during his father's life-time in the exercise of sovereign powers.¹ It may also be noticed here that when these early chiefs managed to make their office hereditary, the rule of succession to the principality did not develop any inviolable right of the eldest son. On the contrary these early chieftainships seem to have emerged out of its elective stage as absolute properties of the ruling chiefs who could nominate their successors without any regard for anybody's claims,² and might even subdivide principalities among several of their nominees.³

However that be, feudalism is no doubt an important factor in the formation of modern European primogeniture.⁴

Feudalism indeed is a factor in the formation of modern European primogeniture.

If we are allowed here to anticipate the results of our subsequent enquiries we may state that one of the early outcomes of feudalism was the grant of the estates called

"benefices." The distribution of property among the victorious

¹ Cf. the institution of युवराज in early India.

Mababharata, Adiparva, 73rd Chap., 85th Chap., etc.

² Choice was perhaps confined to the members of the royal family. There is no case of selection outside the family.

Cf. History of Japan! From Jimmu downwards scarcely an eldest son succeeded (The Story of Japan by David Murray, Ph.D., LL.D.), pp. 47-63.

³ Cf. German Subdivision of principalities. There are numerous instances of such subdivision by early Hindu chiefs. See Ramayana and Mahabharat.

⁴ As to the nature and extent of the influence of this factor see Vinogradoff, Outlines of Hindu Juris., p. 284. See also Evelyn Cecil, Primogeniture, p. 17.

Goths was effected in four or five ways.¹ Every warrior, who was entitled to and was willing to accept, received a grant of allodial land² which he held as his absolute property, free of services to individuals, and which he might leave to an heir after his death. When the warriors had been provided for, the surplus land belonged, according to Germanic notions, to the community or fisc. Part of it was subsequently lavished, with somewhat misplaced zeal, upon the monasteries; part of it was devoted to the maintenance of the government or court; part found its way to augment the allodium; and part was allotted as temporary possessions to be held for life on payment of some rent or service. Tenures of this latter nature acquired the name of benefices or honours and were granted both by the crown and by the nobles in their private capacity.³ These seem at first to have been granted for life only and as such were very precarious.⁴ On the life-tenant's death the lands reverted to the fisc, but were generally regranted to his children out of indulgence.⁵ At length from being hereditary out of favour, they became hereditary as of right. In Spain the benefices of the crown were declared hereditary before the middle of the seventh century; those of private individuals were granted nominally for life, but could not be withdrawn from the heir if he was a proper person and willing to take them. In France, under the Merovingian Kings, benefices were generally considered to have become hereditary in

¹ Allen on Royal Prerogative, 132-134.

² Allodial land was contradistinguished from Feudal land as land held without acknowledging superior lord.

According to Lord Coke, there was no allodial land in England (Coke on Littleton, 93a).

³ Spence, Origin of Laws of Europe, 342-343.

⁴ Allen, Royal Prerogatives, 134; Spence, 279-280.

See also Hallam's Middle Ages, I. 159; 311-314.

⁵ Allen, p. 134. See also Evelyn Cecil, Primogeniture, pp. 18-19.

587 through the treaty of Audley, which was confirmed by an edict of Clotaire II in 615. Charlemagne, however, scarcely tolerated or granted other than life possessions.¹

Had the iron grasp of Charlemagne continued, this turning-point might never have been reached in his empire; but a long line of able rulers is a thing unknown in history. The weakness of Charlemagne's successors doubtless hastened the change. They could not sustain his accumulated greatness, his colossal power of welding together the multitudinous religious, political and intellectual forces. The unruly beneficiaries did not think life-possession an adequate guarantee for power. Frequent hereditary grants were feebly acquiesced in by Lewis the Debonaire.² "In 877 Charles the Bald yielded so far as to issue a famous capitulary making every benefice hereditary,³ and implying a known usage that offices held by the leading nobles should be hereditary also.⁴ It was perhaps only framed for temporary purposes; but it marks the first recognition of a mere possibility as a systematic practice, and betrays a laxity which could not possibly have occurred under a strong government. Little by little the ground was giving way, and henceforward great lords reserved to themselves the right to select their successors from among their children.⁵ It would indeed be curious to know precisely when, why, and how their general right of selection was curtailed. They had struggled hard against the crown's right to evict their descendants from their lands, and they had won. It is now their own turn to experience a limitation of the right they had gained; but the enemy was not another rival power; it was the most subtle of all agencies: the insidious effect of

¹ Montesquieu, *Esp. Lois*. LIV, XXXI, 7.

Allen, p. 210.

² Allen, p. 210. Hallam, p. 311.

³ Spence, 282; Stubbs's *Const. Hist.*, I. 254.

⁴ Montesquieu, XXXI, Ch. 29; Hallam, *Suppt. notes*, 97.

⁵ Montesquieu, XXXI, Ch. 29.

a custom. The right they had fought for was that their benefices should descend to their children; the rule that set in was the immutable succession in the eldest male 'line.'¹

This course of things has not been quite unknown in India too. The 'noblesse' of modern India

A brief survey of the growth of Zemindaries in India.

are the Zemindars and Talookdars of to-day. Their power also arose in turbulent times, when the central government was extremely weak, little able to resist the presumptuous assertions of strong local chieftains, and scarcely anxious to do so, provided the customary revenue dues were punctually paid into Imperial treasury. These Zemindars were originally mere revenue officers and local representatives. They were the Chowdries under the Hindu Rajahs and Crores under the early Mahomedan rulers.² It will be seen later how from being mere revenue officers and local representatives they gradually stepped into the position of proprietors claiming an indefeasible right to the soil. It may only be mentioned here that the Zemindars and other subordinate land-holders owed their position to a gradual and fraudulent assumption³; and could not, at first reckon on retaining it except by their own strength. We hear of

¹ For further development see Spence, 398.

Burton's Hist. of England II, 247; Digby, Hist. of Real Property, 95, for the origin of ultimogeniture; See Vinogradoff's "Outlines of Historical Jurisprudence," p. 285.

² Fifth Report, pp. 81, 82. See also Ramkanta Das Mahapatra vs. Chowdhery Shāmanandā Das, 9 C.L. J. 497 (P. C.) per Sir Andrew Scoble at p. 504.

³ Galloway's "Observations on the Law and Constitution of India," pp. 27, 43, 44, 51-53.

Patton's Asiatic Monarchies, 83, 119, 156, 158, 167.

Harrington's Analysis, pp. 23-24.

See also Halhed's Memoir of the Land Tenure and Rouse's Dissertation concerning Landed Property in Bengal, 1791.

their unjustifiable pretensions as early as the beginning of the fourteenth century in the reign of Alaooddeen. In this era of confusion and violence, it was of the utmost importance to the Zemindars to convert the system of appointments to the post they held into a system of hereditary succession. The feeble government of the Mahomedans was unable to assert its rights, and the customary mandate of appointment, on the demise of a Zemindar, dwindled into a tacit recognition of his son and successor. Again it is curious to notice how and when the eldest son's right to succession became immutable. And here too the agency which brought about this rule of succession may be the insidious effect of a custom. As the offices grew more powerful, and sovereigns grew weaker, the officers extracted from the crown the confirmation of their office as hereditary, and presently it became customary amid the dislocation of society to entrust them entirely to the eldest son. His position even in those days was one of onerous duty and great responsibility. The prosperity of his dependants and his Zemindary, his and their wealth and security, depended upon his exertions; and any remissness on his part would have been attended by general ruin. His vital interest was to act up to his responsibility. Then came a time of greater peace; but his power had been found so serviceable and he had become such an institution that his cast was left embedded in the hardening mould of civilised society. Philips¹ indeed, considers that this method of succession points to a descent of the Zemindars from the ancient Rajahs,—the raj, which was of course in the main a political office, having, according to Philips, undoubtedly descended in this manner.² Of this we have already said something and shall have to say more hereafter. All that we can remark here is that the

¹ Tagore Law Lectures, p. 64.

² But see *post*.

proposition thus laid down by Philips is indeed too wide.¹

But is not primogeniture an anachronism in modern age?

Do we not everywhere hear a cry for equality?

Is primogeniture
an anachronism in
modern age?

And is not the institution inconsistent with the modern conception of property? As a

student of the history of the law of primogeniture we have nothing to do with these and similar other questions. Yet a few remarks as to them may not be quite

out of place here. "Property," says M

Property from ega-
litarian view-point.

Huet,² "is the most irrefutable consequence of the right of existence. It must be an

equal right; for the necessity of the means of existence is alike for all."³ "No one, certainly, should live at the expense of

another, but the man who has not forfeited his right is entitled to live independently; he has a right to be so placed, as that his

labour and his means of existence shall not be dependent on the pleasure of others." "The law should," he continues, "enjoin

that at every demise; the free portions of the patrimony should go to all the young labourers equally," not to speak of all the sons

of the deceased. The Great German Philosopher Fichte⁴

¹ See also T. L. L. (by J. C. Ghosh), pp. 163-170.

Law of Impartible Property. See Vinogradoff's "Outlines of Hist. Jur.," p. 323.

² 'Le Regne Social du christianisme,' Book III c. v.

³ For a criticism of this and similar other views see Miraglia, Comparative Legal Philosophy, Chap. IV, 382-400.

⁴ Prof. Zachariae maintains the same view when he says:

"The rent of land is a reduction of the wages which might belong entirely to the labourer if the soil were not the object of an absolute monopoly. All the sufferings, against which civilized nations have to struggle may be referred to the exclusive right of property in the soil as their source." ("Büchern Vom Staat.") See also Herbert Spencer's Social Statics. For a criticism of this and similar other views see Miraglia, Comparative Legal Philosophy (Modern Leg. Phi., Vol. III, p. 388, Chap. IV).

expressed the same idea when he said "the mission of the state is to keep every one in possession of what belongs to him, to secure to him his property and to guarantee the same to him: the end of human activity is to live; and every individual is entitled to be put into a position to support life. The distribution ought to be effected in such a way as that every one may live by his own labour. If any one is in want of necessities of life, it should be the consequence of his own fault and not that of others. The portion which ought to come to every one for this purpose belongs to him of right, and if he is not yet in possession of it, he should have the means of obtaining it. In a state regulated by reason he will obtain it. In a distribution effected by force and chance, before the awakening of reason, all have not attained to it, because some have taken more than is due to them.

The egalitarian idea, which somehow or other permeates all modern ideas of social progress is at once a reaction of and finds its basis in the sufferings to which all human beings are in general subject.¹ No doubt, there is no equality in merit and intelligence, no equality in human powers; but why accentuate that inequality, why augment initial difference by other adventitious circumstances? That is the common cry of a certain section. We have no desire here to attempt the history of this cry and to show how the special forms peculiar to occidental society brought on its development, how it was revealed to the aging Greco-Roman civilization and then to modern Europe and younger America. Nor shall we proceed to appraise the difference between the modern call for equality and its predecessors. All that we should say here is that primitive men must have been more

¹ See Rene Demogue on "Analysis of Fundamental Notions, etc.," Chap. on Equality: Modern Legal Phil. Series, Vol. VII (Modern French Legal Philosophy).

alike than civilised men. Differentiation has progressed in the same manner as civilization ; or to be more exact, "civilization itself is nothing more than the accentuation of dissimilarities between individuals."¹ Nevertheless the progress of civilization certainly concords with the birth and development of egalitarian ideas. Only at a very advanced stage of civilization was the equality of men affirmed and certain social consequences were attached to it. Being tested through fire and water, being refuted and counter-refuted several times, this modern idea of equality has arisen again in our times like that Egyptian bird from its own ashes, in a new form, and permeates and enlivens the minds of men and moulds their legal conceptions, although never before this had individual differences been so much. We believe it is not self-contradictory. Without going to the bottom of the question, it is enough to note that the idea of equality might be a distinct social fact, explained by reason of its own, being more or less an indirect consequence of, and a reaction from the increasing differentiation of men. The necessity of proclaiming the equality of men was not felt until the differences between them were not merely appreciable but even galling to some. There can be no question of the equality of men in a society composed of sensibly homogeneous elements united by the feeling of equality of needs.² In such a society the idea of equality cannot be disengaged from the more comprehensive and simple idea of solidarity through similitude.³ Men in such a society thought of themselves as solidary with each other, because they had the same needs and consequently

¹ Léon Duguit on Social Solidarity (Modern Legal Philosophy Series, Vol. VII).

² *Ibid.*

See also Miraglia, p. 660 and also p. 427.

³ As distinguished from what Durkheim calls "solidarity through division of labour" of the present day.

Cf. Tikhomirov on the Origin of Mir: "Russia, Political and Social," Book III, Chap. I.

the same desires, and because they understood that they would suffer the least evil in a communal life. This primeval form of solidarity among men was then born of a community of thoughts, needs, and wishes, and led to the formation of groups.¹ It is not indeed difficult to understand how in such a community individuals may be lost in the group, and how leadership may fall on the strongest and wisest who may ordinarily be also the eldest ; but it is indeed difficult to follow how, in a society where individuation is complete, and where the idea of individual worth has reached its climax, any privilege can remain attendant upon such an accidental factor as priority of birth. Yet in such societies you will meet with the rules of primogeniture, the rules that are, in all appearance, the direct violation of the principle of individual equality. Law indeed is not logic. Yet it is a part of sociology. It has its birth and being in society. How can then a law of primogeniture be countenanced in a society professing an idea so clearly inconsistent with it, an idea of equality? Nay, not only that; the people even went further. "The rise of primogeniture under feudalism in the Middle Ages appears to have created the

¹ Their idea of equality will not extend beyond the group. The Greek styled all foreigners "barbarians" and by this appellation expressed a certain degree of contempt for them, looking upon himself as alone in possession of true dignity and culture. It was his own manifold excellence, his own desert, upon which his pride was based. Not so with the Vedic Aryans. He prided himself, not upon his superiority in respect of social culture, but rather upon his religion. He boasted that he belonged to a nation which worshipped the true God and was by Him guided and protected. The spirit of selfish aggrandisement common to all nations of the olden times rests here with the Vedic Aryans at least upon a religious basis; they present no other form of an appreciation of themselves than is to be found among the people of the Old Testament" (Routh). These Vedic Aryans named their enemies **अनृतः** (Rigveda VI. 14, 3), **अपन्नतः** (V. 42, 9), **अयान्तः** (I. 131, 4), **अलिप्तः** (I, 133, 1).

occasion and demand for testamentary disposition.”¹ But how was this testamentary power utilized? “As the feudal law of land practically disinherited all the children in favour of one, the equal distribution even of those sorts of property which still might have been equally divided ceased to be viewed as a duty.”² They did not avail of the power of testacy they won to remove the inequality: on the contrary they wielded it to foster primogeniture, to augment its strength. The aim was the one, the fate was just the reverse. The deflecting causes must have been stupendous; being based on enonomic content of law derived from physio-psychical and historical elements and external forces.³

However that be, this institution has been for the last half a century the object of much controversy. It has been assailed as one of the most “inequitable and barbarous relics of pre-historic and Mediaeval past,” and Prof. Maitland is of opinion that “absurdity can go no further than to represent the badness of this law as a sentimental grievance.” He characterizes primogeniture and the postponement of women as the two capital follies⁴ with which the English Law of Inheritance can be charged. If not so indignantly, yet equally unhesitatingly, Adam Smith pronounces his opinion against the institution by saying that “nothing can be more contrary to real interest of a numerous family than the right which in order to enrich one beggars all

The institution has been the object of much controversy.

Views of Maitland.

Adam Smith.

¹ Select Essays in Anglo-American Legal History, Vol. III, p. 780.

² *Ibid.* Also, Maine, Ancient Law, p. 217.

³ See Prof. Vinogradoff's Outlines of Historical Jurisprudence, p. 284.

⁴ See Prof. Vinogradoff's "Outlines of Historical Jurisprudence," pp. 285-287, where he gives an interesting account of the origin of those institutions.

the rest of the family." ¹ But again it does not lack in champions. The most familiar as well as the strongest argument in favour of primogeniture is derived from considerations which must be called, in the largest sense, political. It

Burke.

was as a powerful bulwark of the English aristocracy that Burke defended it in his appeal from the new to the old Whigs, emphatically declaring that "without question it has a tendency to preserve a character of consequence, weight, and prevalent influence over others, in the whole body of the landed interest." The Real Property

Real property Com-
missioners.

Commissioners appointed in 1828 fully endorsed this opinion in their first Report which contains a laudation of the Settlements then in use as "the best means of preserving families and as investing the ostensible lord of the soil with exercising the dominion and power of disposition over it required for the public good." Such are the differences of opinion when doctors sit on abstract judgment of human institutions.

In bringing these preliminary remarks to a close it would not be quite out of place to say a word or two about the method to be followed in our investigation, and in fact in all other similar investigations. In every case of institutional growth in history two things must be clearly distinguished even from the very beginning for a correct understanding of the process and its results. The one is the change of conditions in the political and social environments which made the growth necessary, and the other is the already existing institutions which began to be transmuted to meet the new demands. A general similarity between two completed systems of primogeniture by no means

¹ Mr. M. L. Newman in an Essay on the "English Land Laws" speaks of their tendency to establish in the centre of such family "a magnificently fed and coloured drone, the incarnation of wealth and social dignity."

The Hon'ble Sir George Brodrick condemns the institution from every point of view—political, social and moral.

implies identical origin and similar growth. Such similarity does by no means exclude the possibility of their having started from different institutions, and developing under different circumstances. Each country may give its own account of the institution, and before attempting a general history of the subject we shall first of all take up each country or similar groups of countries separately, and then proceed to see if these detailed accounts will yield any general result.

CHAPTER I

TRACES OF PRIMOGENITURE IN ANCIENT EGYPT, BABYLONIA, GREECE AND ROME.

Besides India, Babylonia, Egypt and China are the three seats of archaic civilization, and the ancient history of each is absolutely free from European influence. These are remarkable for the permanence, as well as the antiquity of their national greatness, and have left authentic records, from which it is possible to reconstruct the outline of their social and industrial life, and to understand upon what principles they regulated that portion of it which had to do with possessions, or the instruments by which life is maintained.

The whole fabric of Egyptian civilization and society is so uniform, so simple, and yet so massive, and like the monuments of its art, so calmly impenetrable to decay or change that it is particularly difficult to deal analytically with its different aspects and elements. Every relationship seems intended to reproduce the state of friendly sociableness or affectionate utility which is the essence or condition of domestic happiness ; and the information to be gathered from existing sources, respecting laws, religion, custom and history, is so mingled together as to make it doubtful whether any one of these can be understood alone.

We shall begin with the history of ownership in Egypt, not because of any greater antiquity of the Ownership in Egypt. Egyptian civilization, but because the materials for inquiry are so much more abundant in Egypt than in Babylonia, that on this ground only it would be convenient to consider the records of that country first.

"There can have been no considerable settled population in the valley of the Nile before the advent of the Egyptians,

since the inundation would make the country uninhabitable for a great part of the year and unattractive for the remainder except to a race of civilized agriculturists." ¹ We need not stop here to examine the history of the Upper and Lower Egypt nor is it necessary for us to guess which part was the first settled one. All that we should notice here is that soon after settlement the tract was divided in *nomes* or provinces, and many of these *nomes* were probably governed originally by more or less independent princes called *nomarchs* owing only a general fealty to the sovereign of their half of Egypt. Prior to the consolidation of the *nomes* as centres of Political Government, smaller administrative units in the form of town-ships had already elaborated and given customary fixity to the type of government which the kings and princes of history were expected and required to reproduce. "One of the strongest features of the Hamitic race, indeed, is its remarkable taste and talent for organisation. The Berber villages of the present day have an elaborate government and codes of customary law as detailed as those of the mediaeval Basques; and the earliest representatives of the race, who succeeded in founding its most stable and powerful monarchy, are not likely to have fallen short of their successors in the qualities which make the village organization almost indestructible as well as all-powerful within its traditional sphere." ²

The local organization in Egypt, the *nomit*,³ in its earliest form probably represented the smallest enclosure inhabited by distinct family groups, or, in other words, the smallest community held together and regulated by a civil or social pact instead of by the automatic action of domestic relationships.⁴ The Egyptians seem to have for a long time been content to apply the same name to aggregations of different size and

¹ Simcox, *Primitive Civilizations*, Vol. I, p. 37.

² See Simcox, Vol. I, p. 38.

³ Simcox, Vol. I, p. 39.

⁴ See Simcox, Vol. I, p. 39.

importance ; any group of hamlets or dwellings rallied round a common centre—market, fort, government office, chapel or tomb—might form a nouit, and a certain number of these groups, united by a common worship, constituted a larger nouit, the city or capital of the nome.¹

“The Government of the early empire was decentralized ; local tribunals, magazines, and militia existed showing that the government of the princes had included all these elements. But from the third to the fifth dynasty the power of the Crown seems to have been in the ascendant when the great nobles of the country were content to follow the king to the capital and to hold office by his appointment, and it is highly probable that a feudal period followed one of primitive monarchical centralization.”²

The tendency under the later monarchy was to substitute the *appointed nomarch* for the hereditary prince, and this tendency was probably associated with the growth of the cities and the increase in their comparative importance. The prince was ruler and lord over a number of village headmen who looked to him for protection in return for tribute, and no change in the political status of the superior chief affected the minor administrative details which alone were of practical importance to the people. If a break occurred in the succession when the local governor had enjoyed the rank of an hereditary prince, the king did not, as in modern Feudalism, claim to annex the inheritance of the vassal to the crown, but bestowed the dignity on some suitable officer of his own, who might even hope to be succeeded by his son. Hereditary offices were not rare in ancient Egypt.³

¹ Thus Thebes is Nouit-Ammon, and the worship of particular deities is the most distinguishing mark of many provinces. The Greeks called the greater nouit *πολις* and the lesser ones *κωμη* (See Simcox, *Primitive Civilizations*, Vol. I, p. 39).

² Simcox, p. 39.

³ Simcox, Vol. I, p. 41.

"From the village to the city, the province or the state, the same organization prevailed: there is one person who "shows the way" to his neighbours, fellow-townsmen, fellow citizens or fellow countrymen; him they look up to and obey, and from this leader or chief within the sphere of his authority, they expect justice and protection in return for their obedience." ¹ The soil thus seems hopefully fertile for the growth of primogeniture, and it remains to be seen whether primogeniture could develop in Egypt.

The history of Egypt falls into three or four main periods the ancient Empire, including the reign of the first six dynasties, the Middle Empire, represented mainly by the great twelfth dynasty and the new or later Empire, best represented by the Eighteenth or Nineteenth dynasty. After the twentieth dynasty the period of decadence, ending with the loss of Egyptian independence, sets in. But from first to last there is very little change in the broad general features of Egyptian life; the constitution of the state, the social order, the customary working of the domestic relations, undergo little alteration through the three thousand years or more during which they can be traced, so that there is little risk of error in using the documents of the most distant periods for our purpose. The Egyptians were very strongly conservative, all classes valued their life just as it was, feeling and believing that any change at any point must be a change for the worse.²

We proposed to deal with the history of ownership in Egypt. But the questions as to the ownership of land here have been mixed up with theories as to the privileges of priests and soldiers, and these again form a part of the general problem as to the existence of hereditary castes; and the views taken on this point have, in their turn, an important bearing on the

¹ Simcox, Vol. I, p. 41.

² Simcox, Vol. I, p. 42.

history and position of the monarchy. The rule governing the succession to the throne is connected both with the political and the family organisation; and the provision actually made for the priesthood and the military class touches both the industrial and the administrative system.¹

The question whether anything answering to what we call caste in India existed in Egypt has been the subject of much discussion. The Greek authors who professed to prove that occupations were hereditary in Egypt knew nothing of the strict caste system of India, and certainly did not mean to assert that such a system existed in Egypt. Dr. Birch denies that caste in the modern Indian sense, which means limitation of marriage to women of the same order, ever existed in Egypt.² Yet caste did exist in Egypt, and consistently with the characteristic of the easy-going Egyptian temperament so much of the Indian custom of caste as imposed any obligation was waived, and only as much of them as constituted a privilege was retained. Though we are told little about the *duty* of a son to follow his father's calling, we very often hear of his *right* to enter upon his father's emoluments and to sit in his seat. Occupation was hereditary in Egypt, in just the same way as property.³

The national customs regarding inheritance are so closely interwoven with the theory of descent, that it will be necessary to examine the latter before saying anything about the laws of inheritance. "The original rule of Pharaonic succession seems to have borne a close resemblance to that of the Incas. The essential thing for the prince was to be of the royal blood on both sides, and if there was no other way of securing this, the

¹ Simcox, Vol. I, p. 108.

² See also Gardner Wilkinson, "Manners and Customs of the Ancient Egyptians," I, 159.

Even in ancient India there was no such limitation though there was caste.

³ Simcox, Vol. I, p. 109.

king must marry his sister." The son of a king begotten on a wife who could not claim royal descent was not strictly legitimate for the purpose of inheriting the throne. Similarly a prince, who reigned only in right of his royal wife was not a legitimate king, and though his authority might be fully recognized *ad interim*, it was for his interest to associate his son with himself upon the throne as soon as he could. The legitimacy of such a son was unquestioned, and as the father could not transmit a better title than he himself possessed, this fact by itself shows that royal descent on the side of the mother was alone absolutely indispensable.¹

This gave rise to the custom of sister-marriage in Egypt, and it is not known whether the custom was restricted to half-sisters or to cases in which the sister had special hereditary rights.²

Whatever that be, there seem to be two strongly marked features in that organization which is at the root of the later family law, *viz.*, the importance attached to primogeniture, and the importance attached to descent in the female line. Nearly all that is peculiar in Egyptian institution may be traced to the working out of these two principles conjointly.³ Almost all ancient inscriptions give evidence to the fact that a person in Egypt used to be described as his mother's son,⁴ and from these and numerous other evidence it is almost impossible to doubt that descent was originally traced in the female line in Egypt, though there is an enormous gulf to traverse between any society in which we know of or can imagine the prevalence of Mutter-Recht, and the most ancient social state known to have

¹ Simcox, Vol. I, p. 110.

² In the lamentations of Isis and Nepthys, the goddess calls upon Osiris: "Come to thy sister, come to thy wife, I am thy sister by the mother." The Hebrew custom tolerated marriage with a half-sister on the paternal side only.

See Records ii, 117; See also Simcox, Vol. I, p. 111.

³ See Simcox, Vol. I, p. 112.

existed in Egypt. "The strict principle of Mutter-Recht, or female descent, obtains without inconveniences among the Australians or North-American Indians, because the consequences of relationship are mainly theoretical. There a man gets his sister's son, instead of his own, as his heirs, and makes the clan or tribal connection outweigh that of the family; and when the family is loosely organized, and the head of the family has little to bequeath,—when in fact he cares equally for sons and nephews, and the sons have no experience of the enjoyment of family property, which might make them resent the loss of it,—no one has a strong interest in modifying the traditional usage. But, as in Egypt, when the family life had been established on a civilized footing, when the family affection had become not only strong, but self-conscious, and the natural communism of affectionate families had come to embrace the seasonable crops and ordinary tools by which industry secured abundance in the Nile valley, it was impossible that the transmission of property should be allowed to take a different line from that traced by natural affinity." "There may have been some prehistoric interval during which family property existed, but was transmitted exclusively, as descent had been reckoned, through women; and the sister-marrying must have been able to take root in Egypt during such an epoch. It would also account for another inveterate eccentricity; namely the mania, of Egyptian husbands, for abandoning all their property to their wives. If by ancient custom sons and daughters inherited from their mother only, a father wishing to bequeath his property to his children, or rather to ensure its passing to them as a matter of course on their parent's death, may have found it expedient to make a gift of it to his wife."¹

But would all the children inherit equally or was there any law or usage by which only one of these succeeded? Opinion

¹ Simcox, Vol. I, p. 113.

in Egypt seems not to have been favourable in the progressive concentration of property in the hands of a single family. In later times the inheritance of both parents was *divided equally* amongst all the children. Yet there had been a time when some sort of primogenitary rules seems to have been in force in Egypt. In fact the right of the royal wife's eldest son to inherit the throne is recognized in a variety of ways all through the historical period.¹ In private life a sort of partnership seems at one time to have existed between the father and his lawful first-born, and this was recognised more or less by the kings as well as by the general family law of the country. It has sometimes been doubted if the sister-marrying in royal families had its origin in some such primogenitary rule. It is quite probable that the marriage of brothers and sisters was resorted to, if the daughter's inheritance included some office, which her brother was qualified to fill; ² and it is a curious question whether in those cases where the king was undoubtedly married to his sister, the latter was the elder child and therefore better entitled to the inheritance.³ The famous Egyptian queen Ramaka Hatasu, who was appointed by her father Thothmes I, co-regent with himself, was considered to have some more legitimate title to the throne than either Thothmes II, the brother whom she married, or Thothmes III, who was associated with them in the government, apparently in default of children of their own. In this and similar cases the superiority seems to have lain in age.

In the hypothetical state of primitive society in which the mother is the only fixed element in the family, there seems to

¹ Simcox, Vol. I, p. 117.

² Simcox, Vol. I, p. 114.

³ *Ibid*, p. 118. Such marriages were neither the rule nor the exception, and it is difficult to see why that should have occurred so frequently.

be little ground for giving precedence to the *eldest child*. Sons and daughters on reaching maturity pass into the cousinhood or clan, in which their place is determined by other considerations than the order of their birth. The first genealogists did not care to go beyond the statement that a man's mother and his mother's brother were of a valiant stock. It is only when the family has been founded, when the father and mother of a family are united for life to each other and to their children, that the latter form a community within which degrees of precedence can be counted.

Polygamy of the patriarchal sort is not incompatible with the institution of an eldest son as heir, though complications would arise when Ishmael happens to be older than Isaac. In Egypt the institution would be free from such complications, as here though polygamy was tolerated, the ideal Egyptian was husband of one lawful wife whose affection was his delight in life and his glory in the grave. "The husband of one lawful wife is indeed the first person who can make sure of the heirship of an eldest son; and it seems as if the Egyptians, having invented marriage as a permanent, exclusive relation, discovered that it involved the existence of an eldest child, and became all the more in love with their invention because of this its natural consequence." ¹

This reconstruction of the Egyptian theory of family relations indeed looks fanciful and imaginative. But there are materials for this building up. The gods themselves are commonly arranged in triads, consisting of father, mother and son, and the solidarity of this group in the human family is abundantly proved by documents ranging from the fourth dynasty to the Roman period. "Eldest son" is a recognised, quasi-official title in the tomb-inscriptions of the first six dynasties, and in the comparatively later table of precedence it is given as next in dignity to the title "Royal son." The

¹ Simcox, Vol. I, p. 121.

elements of the character for eldest son signify to 'guide' or 'lead,' and bear the general sense of head of the family, the leader of the other children.¹ The title of "Eldest son" is habitually applied to Thoth in regard to Horus, so much so that the Rhind Papyrus translates the demotic proper name Thoth by the epithet Samson. Osiris is the eldest of the five gods, and a hymn of the eighteenth dynasty describes his relation to his parents and brethren in the terms considered appropriate to various mortals: "He is the eldest, the first of his brothers, the chief of the gods; he it is who maintains justice in the two worlds, and who places the son in the seat of his father; he is the praise of his father Seb, the love of his mother "Nou."² But the strongest proof of the early age at which eldest sons were distinguished, and distinguished in connection with ideas of inheritance, is furnished by the phraseology of the Egyptian funeral ritual, the so-called Book of the Dead,³ of which M. Pierret's translation runs as follows:—"Thy father Seb has transmitted all his heritage to thee."....."The day when Horus was constituted heir of the appanages of his father Osiris!"....."I am Horus the heir"....."I am your Lord, oh Gods! I am the son of your master; you belong to me through my father"....."I traverse the earth as an heir in the footsteps of the manes"....."I am the great first heir"....."Osiris the eldest of the five gods, the heirs of his father Seb"....."It is Horus, the brother of Horus, the heir of Horus"....."I present food to the divine heir"....."Horus the heir of Ra"....."I am Horus, the avenger of his father, the son of Isis, the heir of Osiris." Such a collection of passages certainly shows that the recognition of the heirship of eldest sons is as old as any element in the social life or religious thought of the country.

¹ Simcox, Vol. I, pp. 121-122.

² Hymn to Osiris (Records IV, 99). Simcox, Vol. I, p. 122.

³ Simcox, Vol. I, p. 122.

The "Prisse Papyrus," sometimes described as "the oldest book in the world" is "an arrangement of good words" by Ptah-hotep, a prince and nomarch who flourished in the reign of Assa, the last king but one of the fifth dynasty. The sage is careful to call himself the *eldest* of his race. Amten, an officer of Senoferu, towards the end of the third dynasty, distinguishes the lands he has received from the king and those he inherits from his father. He describes certain domains as having been in his possession from his earliest childhood; his father gave them to him. The title "Eldest son" recurs frequently in the oldest inscriptions together with that of "royal legitimate son," "legitimate eldest daughter" "noble legitimate prince" and the like.

It is an interesting question whether the Egyptian rule of Primogeniture was absolute, so that the eldest child without distinction of sex was the heir. We have already noticed materials which may lead us to suppose that this may have been the case at least to some extent, and this was perhaps why a king's son should marry his sister, when she was the eldest, and so the legitimate heir.

But what was the exact legal position of the Primogenitus in early Egypt? The children had a sort of partnership in their parent's property even during the life of the latter. Sometimes the father is represented as contracting for his sons, just as, after or even before father's death, the eldest brother takes action on behalf of the rest, or, "stands up for them." The family property could originally be disposed of only with the consent of all three members of the family group, and even the father was in some way dependent for his full legal competence upon the possession of a son and heir. In the Book of the Dead and other solemn documents it is spoken of as the function of the eldest son to bear witness, to make answer or to plead for his father, as Horus for Osiris against Seb, before the tribunal of the gods:

Legal position of the
First-born.

The position of the eldest seems thus more onerous than privileged. He was heir to his father or rather was a partner even during the life-time of the father. But it is not clear if he alone took the entire property. It seems to have been open to the father to divide the property amongst the children during his own life, and if he did not do so, the eldest son took his place and had to make the division on his death. He was bound to respect the customary rights of his juniors, and if they were dissatisfied, he could be put upon oath, which was considered to be equivalent to compelling him to confess the truth as to the verbal instructions given by his father.¹ All the children had equal shares, and if one of the brothers or sisters died, leaving no issue before partition, his or her part was given to the eldest child of the second generation as representing the rest. The eldest took them only in representative capacity, representing his junior brothers and sisters.

We now pass on to Babylonia. As in Egypt, the father, the mother, and the elder brother are the three essential elements in the family.

Whether primogenitary rules ever prevailed here in Babylon will no doubt be only a matter of conjecture. That some importance was attached to the priority in birth seems well supported by ancient materials. The Babylonian moon-god is the first-born of Mullil, the lord of the under-world; and the god Thoth was known as "the eldest" son of Horas; so the name of "the first-born Bel," as Nebo is called, is supposed to furnish the name of the sun-god worshipped on the island of Bahrein.² This sun is invoked

¹ Simcox., Vol. I, p. 215.

² Hilbert Lecture, pp. 171, 226, 117.

The Sun-god is called Ex-Zag in one inscription, Zag being a translation of first-born. (Journal, Royal Asiatic Society, 1880. The Island of Bahrein, p. 189.)

See notes by Sir H. C. C. Rawlinson.

as "god who setteth at rest his father's heart." The elder brother is named immediately after the father and mother, as one whose curse may have to be removed by Merodach. The God Ea, the primæval spirit of Babylonia, has a mother, as well as a daughter and a first-born son. Like the Egyptian kings, the Babylonian gods are supposed to recognize a favourite as well as an *eldest son*. In the time of Gudea, when the Sumerian regime was several hundred years old, the eldest daughter seems to act for the family when there is no son. "In the house where there is no son, it is its daughter who new offerings has consecrated; for the statue of the god before the mouth she has placed them." It is argued from this that the custom regarding inheritance was less favourable to women than in Egypt, since their right to inherit in the second place was liable to be contested in time of disorder.¹

Discoveries made within the last half a century have led the students of the earliest monuments of Babylonia to claim for the kingdoms of Sumer and Akkad an earlier date than even that assigned for the foundation of Egyptian monarchy, and we have already noticed that no trace of primogenitary rules is discoverable in the Akkadian laws,² and little is known of Sumerian laws so as to enable us to make any statement relating to that system.

It is really with the reign of Hammurabi that the importance of Babylonia begins, and the laws prevailing in Babylonia at the time are contained in a valuable document known as the code of Hammurabi.³ This famous code speaks of equal division of inheritance, and seems to show no preference to priority in

¹ Daughters share normally with sons in the inheritance. See Simcox, p. 368.

² See *Intro.* p. 25.

³ *Evolution of Law Series*, Vol. I, Chapter XIV, p. 387.

birth.¹ There seem to have been some current maxims of the law, preserved by tradition and liable to be quoted from time to time in legal decisions, which would go to show that partition of brothers was not much favoured in Babylon. A saying translated by M. Oppert to the effect "He who does not divide the honour of his succession" seems to praise an undivided family. Sininana and a son of Ubarsin were at variance and went to law, and the judges, after awarding an equal share to each, proclaimed, according to the original version of George Smith: "Brother to brother should be loving, brother from brother should not turn, should not quarrel over the whole, a brother to a brother should be generous, the whole he should not have."²

There seems to be certain provisions in the code of Hammurabi regarding Crown lands, and it appears that such lands were held by an officer in lieu of service rendered, and as such seem to have been descendable to one son only. "If an officer or a man be captured in the garrison of the king, if his son be able to take charge of his business, the field and the garden shall be given to him, and he shall take his father's field"³; "if his son be a minor, not able to take charge of the business, the third of the field and garden shall be given to his mother, and she shall bring him up."³ "An officer, sub-officer or tributary may not transfer in writing his field, garden or house to his *wife* or *daughter*, nor may he assign them for debt."³ He seems to take a service tenure in such lands and

¹ Hammurabi Code, 105, 166 and 167 would point to this. See Evolution of Law Series, Vol. I, p. 421.

² See Simcox, Vol. I, p. 338.

Cf. Mahābhārat, the story of Gaja-Kachhapa.

³ Hammurabi Code, 28, 29 and 38 (Evolution of Law Series, Vol. I, p. 297). See also 30 to 41.

the law of succession to them excluded females, they being unable to render the service.

The laws of intestate succession in Greece and at Rome have been so often and so fully discussed that these
 Greece. Position of females in Greece. may be here passed over with the briefest mention.* Unlike in Egypt the position of women in Greece has not been favourable to them even in early days. Daughters have been viewed as burden on the estate and the sons in cases of intestacy inherited the estate in equal shares, being, however, under an obligation to maintain their sisters and provide them with marriage portions. At Athens, even where there were no sons, the daughters were excluded from succession, the property going, subject to similar condition, to the nearest male kinsman.¹ It will be interesting to notice here the early Grotyn
 Early Grotyn Law. law on the point where in cases of collateral succession some vestiges of primogeniture seem indeed to be traceable. "An heiress," we are told in the laws of Grotyn,² "shall be wedded to her father's brother, the eldest of those that are. And if there be more heiresses and father's brothers the second shall be wedded to the next eldest. And if there be no father's brothers, but brother's sons, she shall be wedded to one that is child of the eldest. And if there be more heiresses and more brother's sons, the next eldest heiress shall be wedded to another who is next to him that is child of the eldest." In like manner we find³ at Athens, in the law of Solon, that when the heiress of a property (επικληροι) was claimed by a kinsman whose age or infirmities precluded the hope of offspring, the husband's place was supplied by his next of kin. Referring to this Plutarch remarks, "it seems an

¹ Smith's Dict. Ant.

² Evolution of Law Series, Vol. I, p. 459.

³ Plutarch's Lives, 'Solon,' c. 20.

* See also Muller's 'Dorians,' Vol. II, pp. 211.

absurd and foolish law which permits an heiress, if her lawful husband fail her, to take his nearest kinsman; yet some say this law was well contrived against those who, conscious of their own unfitness, yet, for the sake of the portion, would match with heiresses, and make use of law to put a violence upon nature; for now, since she can quit him for whom she pleases, they would either abstain from such marriages or continue them with disgrace and suffer for their covetousness and designed affront." You may notice the width of the moral gulf between the age of the biographer and that of the illustrious subject of his memoir—Solon. Plutarch concludes by saying, "It is well done, moreover, to confine her to her husband's nearest kinsman, that the children may be of the same family." But Solon, like a true statesman, professed not to have made the best laws, but the best that his people would accept. "And therefore, when he was afterwards asked if he had left the Athenians the best laws that could be given, he replied, "The best they could receive."¹ Indeed this rule of collateral succession in Athens was so imperative that the lady had no choice in the matter; and the man, if he had been previously married, was obliged to put away his former wife that he might enter upon this new marriage. The son of the heiress took the name of his maternal grandfather, and became his heir. Similar rules were in force among the Dorians, by whom the heiress was called not *επικλνρος* but *οπιπαματις*. "Regulations concerning heiress," says Müller,² "were an object of chief importance in the ancient legislations, on account of their anxiety for the maintenance of families, as in that of Andromachus, of Rhegium, for the Thracian Chalcidians, and in the code of Solon, with which the Chalcidian laws of Charondas appear to have agreed in all essential points." The Athenians seem also to have adopted the Indian expedient of making

¹ Plutarch's *Lives*, 'Solon.' See *Evol. Law Ser.*, Vol. I, p. 80.

² K. O. Müller's *Dorians*, Vol. II, p. 209.

पुत्रिका in case a man left no son. "A man who had a daughter but no son, might give his daughter in marriage on the express condition that the son of that marriage or one of its sons, should belong to him. Thus his grandson, became, in contemplation of law, his son, without adoption or any other process. So common was this custom at Athens that a special name, *θυγατρίδους*, was used to express the relationship."¹ At Sparta, however, the women seem to have occupied a better position; we learn that at the period when Aristotle wrote his "Politics" the number of heiresses was very considerable, so great, indeed, as to have been regarded by the philosopher as presenting a grave political danger.

Greece indeed was never a fertile soil for primogeniture, and its law-givers very often busied themselves with establishing equality amongst the citizens. Greece, never a fertile soil for primogeniture. Lycurgus,² one of the earliest law-givers of Sparta is said to have actually divided the land equally amongst the citizens. "After the creation of the thirty senators, his next task, and, indeed, the most hazardous he ever undertook, was the making of a new division of their lands. For there was an extreme inequality amongst them, and their state was overloaded with a multitude of indigent and necessitous persons, while its whole wealth had centred upon a very few," "...he obtained of them to renounce their properties, and to

¹ Hearn, "Aryan Household," p. 104.

² It is now admitted on all hands on the authority of Grote that the supposed Lycurgean partition of the soil, so long assumed on the authority of Plutarch, had no existence in fact; that inequality of distribution had always been more or less characteristic of the tenure property in Sparta; and that under the peculiar conditions of that state it in the end produced disastrous consequences, of which the most serious was steady diminution in the number of properly qualified citizens. Aristotle mentions Phaleas of Chalcedon as the earliest author of an agrarian law of which the object was the equalisation of property (Aristotle, Pol. II. 7).

consent to a new division of the land, and that they should live all together on an equal footing ; merit to be their only road to eminence, and the disgrace of evil, and credit of worthy acts, their one measure of difference between man and man." "Upon their consent to these proposals, proceeding at once to put them into execution, he divided the country of Laconia in general into thirty thousand equal shares, and the part attached to the city of Sparta into nine thousand." "It is reported, that as he returned from a journey shortly after the division of the lands, in harvest time, the ground being newly reaped, seeing the stocks all standing equal and alike, he smiled and said to those about him, 'Methinks all Laconia looks like *one family estate just divided among a number of brothers.*'"¹ The self-complacent remarks of the law-giver is significant, and it shows that in case of a family estate equal division was the rule, there being no privilege attached to priority in birth. Several successive attempts at equalization after Lycurgus have been made in Greece and with this object in view they have sometimes been given the law regulating the number of children, sometimes law forbidding sale of inherited estates....but at no time the expedience of impartibility, the rule of primogeniture struck these early Greeks. Sir H. S. Maine indeed asserts² that the privilege of the eldest son was unknown both to the Hellenic and to the Roman world. Prof. Hearn³ on the contrary is of opinion that this proposition, so far at least as regards Greece, cannot be supported. According to him "the older Greek custom, if they do not in express terms state the rule, recognize it by necessary implication." "There was a constant effort of the Hellenic conservative party in Sparta, in Thebes, in Corinth, and other cities to revert to the old practice of a determinate number of lots or

¹ Plutarch's Lives, 'Lycurgus.' See Evol. Law Ser., Vol. I, pp. 63-64.

² Early Hist. Inst., p. 198.

³ Aryan Household, p. 81.

hereditary properties in each city; or, as it is sometimes expressed, of having only a given number of families." Such an attempt, according to Prof. Hearn,¹ shows that the right of the eldest had existed, and that it was, at that time in a state of decay. It is, however, doubtful if Prof. Hearn is correct in these remarks. We have already referred to some of these attempts mentioned by Prof. Hearn and to my mind these emanated from a growing egalitarian principle and the prior inequalities do not appear to have been the result of any such institution as primogeniture. Lycurgus at least does not complain of any such inequitable rule; on the contrary his self-complacent remarks refer to a law which would negative the idea of any such privilege attached to priority in birth.

Yet even in Greece the eldest son does not always seem to have been without any consideration. The
Traces of Primogeniture in Greece. Greeks had a special word, *πρεδβεια*, to denote the privilege of the elder, and unless some privilege was ever attached to priority in birth such a word would never have been thought of. At Athens, this privilege consisted in his retention, as an extra share, of the paternal house which originally seems to have meant the throwing upon him the onerous duty of performing the sacrifices of the house.

We might in this connection quote a few lines from the Dialogues of Plato² where the philosopher says: "Let the citizens at once distribute their lands and houses and not till the land in common. Since a community of goods goes beyond their proposed origin and nurture and education. But in making the distribution let the several possessors feel that their particular lots also belong to the whole city and seeing that the earth is their parent, let them tend her more carefully than children do their mother. And in order that the distribution

¹ Aryan Household, p 81.

² The Dialogues of Plato, Tr. by Jowett, Vol. V, pp. 122, 740.

may always remain, they ought to consider further that the present number of families should be always retained, and neither increased nor diminished. This may be secured for the whole city in the following manner: *Let the possessor of a lot leave the one of his children who is best beloved and one only, to be heir of his dwelling, and his successor in the duty of ministering to the Gods, the state and the family as well the living members of it as those who are departed when he comes into the inheritance; but of his other children, if he have more than one, he shall give the females in marriage according to the law to be hereafter enacted, and the males he shall distribute as sons to those citizens who have no children and are disposed to receive them; or if there should be none such and particular individuals have too many children, male or female, or too few, as in the case of barrenness—in all these cases let the highest and most honourable magistracy created by us judge and determine what is to be done with the redundant or deficient, and devise a means that the number of 5,040 houses shall always remain the same.*” But Plato speaks of a mere device, no existing rule of law, and we do not know how far this advice was followed.

We have noticed above that at Athens, the eldest son had the privilege of retaining the paternal house as a special portion. Indeed Demosthenes in course of an oration for Phormio refers to *πρεδβεια* saying that Apollodorus had inherited his father's house by the privilege of the eldest son; “he got the lodging-house under the will by right of Primogeniture.”¹ From the speech against Boetus de nomine, we find that the eldest son alone preserved the family patronymic. It would thus appear that at some stage proprietary advantages of the eldest son might have existed even in Greece. But these almost entirely disappeared from view during later years.

¹ Tr. by Mr. Kennedy, Pro. Phorm., 43, p. 955.

The Spartan constitution, which did not regard with favour the extension of facilities for the transfer of landed property, and endeavoured as much as possible to retain in occupation of the descendants the soil which the ancestor had tilled, did not in any way favour primogeniture. Aristotle in his criticism of the constitution pointed out the absence of efforts at affording facilities for transfer and the consequent concentration of wealth in the hands of a constantly diminishing number, as one of its gravest defects. But his reference to the constantly diminishing number did not mean any blame for a Primogenitary institution. No such institution seems to have been in existence at the time.

It must have been noticed in the speech of Demosthenes on behalf of Phormio that there was a reference to "a right of Primogeniture under the will," and this sets us a-thinking whether these early Greeks had testamentary powers, and if so, whether it was possible for them to create entails, to use their power of testation in favour of some primogenitary rule. According to Plutarch,¹ Solon "is likewise much commended for his law concerning wills; for before him none could be made, but all the wealth and estate of the deceased belonged to his family; but he by permitting them, if *they had no children*, to bestow it on whom they pleased, showed that he esteemed friendship a stronger tie than kindred, and affection than necessity, and made every man's estate truly his own. Yet he allowed not all sorts of legacies, but those only which were not extorted by the frenzy of a disease, charms, imprisonment, force, or persuasions of a wife; with good reason, thinking that being seduced into wrong was as bad as being forced, and that between deceit and necessity, flattery and compulsion, there was little difference, since both may equally suspend the exercise of reason." The testamentary power given by Solon thus seems

Entails in Greece.

¹ Evol. Law, Vol. I, pp. 83-84.

to be very restricted being exercisable only when there is no issue left. We do not know how the power developed; but Plato seems to have assumed the right of a father to leave the property to one of his sons only excluding the rest. There is however no material from which we might assert the possibility of the creation of entails in Greece."

If we have failed in our quest in early Greece our position is still more insecure in Rome. Sir H. S. Maine, we have seen, asserts that privilege of the eldest son was unknown both to the Hellenic and to the Roman world. And we have seen with what success Prof. Hearn controverted this opinion so far as Greece is concerned. Even Prof. Hearn had to admit that no evidence of Primogeniture in the history of Rome was available and he only surmised that Primogeniture must have been in force even in Rome, only we are unable to discover any trace, because our knowledge of Roman law commences at a comparatively late period of its development.¹

Students of Roman law have not been wanting in their efforts to construct the history of it. Yet even now there is a great deal of uncertainty as to the rules of distribution which prevailed in the early Republican period. The rule of succession is given in the twelve tables in a fragmentary condition which lays down: "Si intestato moritur cui suus hoeres nec sit agnatus proximus familiam habeto,"—"If he dies without a will and no heir of his exists the nearest agnate shall have the family." But some controversy has arisen as to the exact interpretation of this well-known rule. Hugo Ortolan and Maine think that where an intestate father left surviving children, the paternal estate was equally divided amongst all the unemancipated sons and daughters. Coulanges however thinks that daughters were excluded at Rome as well as in India and at Athens. It is seldom contested that *sons* succeeded to the paternal estate in equal shares. McCulloch

¹ Hearn's *Aryan Household*, p. 81.

however raises some doubt as to the last point also. "It is not easy to suppose that the equal division of property among the sons would be generally practised by parties who resorted to such means¹ for perpetuating its descent in the same lines." Lawrence characterizes this presumption raised by McCulloch as resting on a very doubtful and probably deceptive analogy, and says that "it certainly does not seem an irresistible inference from the circumstances that in one particular the Roman method of perpetuating family estates differ very greatly from our own, that therefore in another particular it must have resembled that with which we are ourselves familiar."² McCulloch adduces the existence of *Latifundia* in the later Republican and Imperial periods, and their devolution in regular lines, as a proof that the Roman paterfamilias was accustomed to devise his property in a method more nearly resembling that of Primogeniture than that of equal division. But the evidence is far from being convincing and there seems to be little reason to suppose that sons did not succeed equally in case of their father dying intestate.³ The obscurity as to the rule of intestate succession has been deepened by the fact that in Rome occasion for intestate succession was very rare. The Romans were indeed in horror of intestacy and we do not know why. Various reasons have been suggested,⁴ but none seems to satisfactorily explain this unusual horror.

But did Romans, like Englishmen, utilize the power of

¹ Refers to the custom of adoption.

A Treatise on the 'Succession to Property vacant by Death' by McCulloch, pp. 18-21.

See Lawrence, The Law and Custom of Primogeniture, p. 10.

² Lawrence, p. 10.

³ *Ibid*, pp. 10-11.

⁴ See Buckland, Elementary Principles of Roman Law, p. 183, and Select Essays on Anglo-American Legal History, Vol. III, p. 723. "The Mediaeval Law of Intestacy."

testacy in favour of Primogenitary rules by creating entails ? or, Was it open to them to do so ?

You all know the Romans did not possess the unlimited power of testacy, and the question whether they could create entails would involve the question whether it was at all possible for them to create limited interests by will. There was a rule under which no *incerta persona* could be instituted *heres* or receive a legacy, and thus, though a testator might create a series of usufructs they must all be to existing persons, or at any rate to persons conceived, and thus property could hardly be effectively 'settled' for more than existing lives and the period of gestation. The right to institute Postumi is no real extension of this power, in as much as the postumi must have been born or conceived at the death of the testator. Fideicommissa however to a certain extent afforded a means of going very much further in that direction in as much as it was at first possible to make Fideicommissa in favour of *incerta persona*, and Fideicommissa on Fideicommissa was possible. For some time this helped the creation of a complete perpetuity; but for aught we know the power was not utilized in favour of eldest sons. In any case Hadrian forbade Fideicommissa in favour of *incertae personae*, so that the power ceased. Thereafter testators inserted in their wills directions not to alienate which in effect would revive the power of creating perpetuity, till Severus and Caracalla provided that such a direction was a nullity unless it was combined with a Fideicommissum. This power was for some time utilized in creating family trusts as will appear from the many illustrations to be found in the Digest. But even then it was never exercised to favour the establishment of any primogenitary rules.¹

Yet Lawrence alludes to the influence of Roman law in

¹ For later development of such power see Buckland, *Elementary Principles of Roman Law*, pp. 181-182.

Also Buckland, *Text Book of Roman Law*, pp. 358-360.

determining the privileges and expanding the rights of the eldest son under the Feudal system of tenure.¹ I can do no better than quote what the learned scholar says about this influence. Lawrence says, "It should also be observed, that Roman Law—and especially the law which prevailed in the Western portion of the Empire at the time of the invasion of the barbarians—had no small share in producing the institution of Feudalism itself. One of the most characteristic features of that system lies in the doctrine of a double property in land held according to its rules, which it always involved. There were the rights of the superior Lord, and the rights of his vassals; these latter, in turn, as the practice of sub-infeudation became more frequent, acquired tenants of their own, often bound to render them service and fealty of a nature precisely similar to those which they themselves yielded to the grantor of the fief; and this is the form which, soon after the compilation of Domesday Book, Feudalism very generally assumed in England. The inferior, or paravail tenants, held their lands from the barons, and the barons, or mesne lords, were the grantees of the king. In any case, however, the phenomenon of at least two sets of rights in the soil necessarily presents itself in all benefices or fiefs; and the origin of such a conception must in all probability be traced, not to the rule and simple *Leges Barbarorum* but to the institutions and laws of Rome. It has been supposed by some writers that this *duplication of proprietary right* was based on the Roman distribution of rights over property into Quiritarian or legal and Bonitarian or equitable. There is much that is plausible in this opinion; and there is no doubt that the Roman element in Feudalism has been disparaged or neglected by writers who attributed too much to reasons of convenience which readily suggest themselves in explanation of almost any historical phenomenon, but which seldom account in a really satisfactory or adequate

¹ The Law and Custom of Primogeniture, p. 24.

manner for its having occurred to the intelligence of those among whom it first arose."

"At the same time, the balance of probability disinclines us to believe that the Roman distinction between legal and equitable property—a distinction belonging to a decidedly advanced stage of juridical thought, and implying the regular operation of courts of law—really actuated the substitution by the barbarians of feudal for allodial tenures; and this impression is confirmed by the fact that there was another form of ownership recognised by Roman Law, and subsisting in the districts where its influence was first experienced by the barbarians, which it is much more natural to regard as the model after which the benefices were shaped. Sir Henry Maine has pointed out that while the *latifundia* of the Roman patricians were almost invariably cultivated by slave labour, large estates of the same kind when held, as was often the case, by the Municipalities were frequently let to free tenants. The Municipal corporations found the work of superintending slave gangs an uncongenial and unprofitable occupation; for the rapidity with which their functionaries were changed—only to be paralleled in modern times by the revolutionary proceedings of M. de Fourtou—made all effective control over such establishments impossible. The example of the Municipalities was eventually followed by many individual proprietors: and the equitable right of the tenant in the soil, originally determined by his contract with the proprietor, was ultimately recognised by the Praetor under the Greek designation of Emphyteusis. From the slave cultivators there arose in time the class of *coloni* 'formed partly,' as Sir Henry considers, 'by the elevation of the slaves, and partly by the degradation of free farmers,' just as he has in another work explained how the status of the inferior tenants of a fief in many cases formed a middle stage between the position of the free 'peasant proprietors' of the prae-manorial village community, and that which was held by the villeins of the lord. The services of the *coloni* were of a

base or predial character, and from the *coloni medietarii*—that is, those who paid as rent one-half of the produce of the land—arose the metayer tenantry of modern Europe. The general analogy between this system and the old English socage tenure is very obvious ; but it would doubtless be rash to assume that there was any historical connection between them. Meanwhile the *Emphyteuta* attained a much more honourable and secure position ; his subordinate ownership was fully recognised by equity ; and he was protected from ejection so long as his quit-rent was regularly paid, and the other stipulations of his original covenant with the superior owner duly observed. It is here especially important to notice the still closer similarity to the system of benefices which *Emphyteusis*, in one of its branches, presented. The *agrilimitrophi* by which the frontiers of the Empire on the Danube and the Rhine were preserved from incursions of the barbarians were held of the State by veteran soldiers, often themselves of barbarous extraction, on terms similar to those enjoyed by the ordinary *Emphyteuta* ; but instead of a quit-rent being required, the services imposed on them were only occasional, and exclusively military in their character. These grants of land usually descended to the heirs of the grantee, and, in the words of Sir Henry Maine, 'it seems impossible to doubt that this was the precedent copied by the barbarian monarchs who founded feudalism.' "

CHAPTER II.

PRIMOGENITURE IN ENGLAND.

Professor Vinogradoff¹ has pointed out that Mediaeval Europe is marked by a system of the economic organisation of inheritance, by a system of unified tenure, having no necessary connection with servility or feudalism. The superimposition of a lord's power might have strengthened the unifying tendencies and contributed to give them definite shape; yet, "their origin is to be sought in the requirements of economic situation, which made for unity as against dispersion, and which was especially strong in primitive times when, as the Serbs have expressed it, 'the single man is no person.' Any system of unified holding would mean the exclusion of some heirs in favour of others and may develop either the primogeniture or the 'ultimogeniture.'"

Whatever that be, there seems to be little doubt that in England, in its peculiar relation to the tenure of land, Primogeniture was not a plant of indigenous growth.² Hale in his 'History of Common Law'³ gives us an account of the rules of inheritance prevailing among the ancient Britons, and tells us that though in cases of Earldoms and Baronies exceptional rules of succession might have obtained, these being in the nature of Principalities, an ordinary inheritance was divided between all the sons equally. No privilege was enjoyed by the eldest and if any dispute arose about the division, the

Primogeniture, not
a plant of indigenous
growth in England.

Laws of inheritance
of the Early Britons.

¹ Outlines of Hist. Juris., Vol. I, pp. 282-284.

² See Cecil, Primogeniture, p. 26.

³ Chap. XI, p. 306.

Druids settled it. A king of Wales in the tenth century gave laws which decreed that "brothers are to share the land between them,"¹ and that "when brothers shall share their patrimony among them, the youngest brother is to possess, the principal homestead, with all his father's stock, the boiler, the full hatchet, and the coulter or plough."² If any privilege was at all created it was created in favour of the youngest. Even titles and dignities were sometimes subject to the rule of division and, as has been pointed out by Robinson,³ was divided among his sons, and afterwards further subdivided among their sons who represented them.

The Primogenitary rule does not seem to have obtained even among the Saxons and Danes. What-
No Primogeniture
among the Saxons
and Danes. ever might have been the rules regarding baronies and royal inheritances, in ordinary cases the inheritances seem to have been open to all the sons, and the daughters too not improbably claimed their full shares.⁴ In Canute's time, not only all the sons, but all the children seem to have succeeded alike: "Sive quis incuria, sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (praeter eam quae jure debetur Hereoti nomine) sibi assumpto. Verum eas judicio suo

¹ Howeldda... Venedotian code (Leges Walliae) Bk. II, C. 12, S. 1. See also Digby, Hist. Real Prop., Chap. II, Sec. II, p. 29.

² Hearn, Aryan Household, 82. The succession of the youngest son to the home of the deceased father is an exceedingly widespread custom. See Sir J. G. Frazer, "Folklore in the Old Testament," I, p. 433.

The youngest son succeeds presumably because usually he is the last to remain at home when his elder brothers have already gone out and started their own households. Frazer, "Folklore in the Old Testament," p. 440.

³ Gavelkind, p. 22.

⁴ Cecil, Primogeniture, p. 27.

White, Outlines of Legal History, p. 165.

uxori, liberis, et cognatione proximis juste (pro suo quicue^r jure) distribuito." ¹ Professor Hearn ² however points out that among the generation of Saxons immediately preceding the conquest, the parents were already accustomed to recognise the eldest son as the head of the family, and to give him the preference in the division of the inheritance.

Lawrence in his essay on 'The Law and Custom of Primogeniture' ³ alludes to the influence of Roman Law in determining the privileges and expanding the rights of the eldest son under the Feudal system of tenure, and observes that "Roman Law, and especially the law which prevailed in the Western portion of the Empire at the time of the invasion of the barbarians, had no small share in producing the institution of feudalism itself."

In England, Primogeniture owed its introduction to other causes than that of the influence of Roman law and it is generally believed that it migrated here with William as an appendage to his feudal policy.

It has been much debated whether anything of the nature of feuds was known in England before the Norman conquest. Digby in his history of the Law of Real Property ⁴ says that the early Teutonic customs had by the time of conquest developed into what may be called, for want of a better name, a kind of feudalism—the relation of king and then of lord and man, and the development of great territorial lordships, of which by far the most numerous were those enjoyed by the king.

¹ Lambard—Saxon laws fol. 119. Cecil—Primogeniture, p. 27.

² Aryan Household, p. 80, where he refers to Bede. "Vita, S. Ben," II.

³ Sect. I, pp. 23-24.

⁴ Chap. I, Sec. II, p. 29.

Cecil, Primogeniture, p. 29.

⁵ Constitutional History, I, p. 188.

According to Professor Stubbs Domesday Book attests the

existence in the time of Edward the Confessor of a large class of freemen, who by commendation, had placed themselves in the relation of dependence on a superior Lord; whether any power of transferring their service still remained, or whether the protection which the commended freemen received from his lord extended so far as to give a feudal character to his tenure of land, cannot be certainly determined; but the very use of the term seems to imply that vassalage had not in these cases attained its full growth; the origin of the relation was in the act of the dependant. On the other hand, the occupation of the land of the greater owners by the tenants or dependents to whom it was granted by the lord prevailed on principles little changed from primitive times and incapable of much development."¹ And Darlymple² is of opinion that under the Saxon rule, while

much of the land remained allodial, a considerable proportion was held under conditions which were practically those of military tenure; and he adduces more than one weighty arguments in support of his opinion that the Feudal system, though elaborated and defined by the Normans, existed in germ or outline under the early English institutions.³ The question is also discussed at length by Wright;⁴ but the learned writer inclines to the belief that the incidents of feudal tenure were not known in England before the compilation of the Domesday record; Lord Coke⁵ however asserts that tenure by knight's

¹ Cecil, Primogeniture, p. 29, Constitutional History, I, 188.

² Feudal Property.

³ See Lawrence, The Law and Custom of Primogeniture, Sec. II, p. 30.

⁴ See Wright, Tenures, Chap. II.

⁵ Coke on Litt. Fol. 14(a). By way of giving a legal colour to the eldest sons' privilege Lord Coke quotes the maxim 'Qui prior est tempore, potior est jure.'

service existed and even drew to itself the incidents of feudalism as early as the time of Alfred.

Lord Coke's view.

The contrary opinion is no less weighty and is maintained by Lord Hale, Somner and Spelman.

Contrary views.

Sir H. Spelman¹ says that "if there were feuds among the Saxons or of that nature, then are we sure they were no more than for life and not inheritable; and he holds that, at the most, there was in effect only a species of tenancy from year to year at first, and afterwards for life." Similar view is maintained by Somner² while writing on Gavelkind. But there seems to be little doubt that "about the time of King Alfred, there was a well-understood obligation to military service, incumbent upon every thegn, as inseparable from his land-ownership."³ The

Ante-Norman tenure and military duty.

exact relation between military duty and the tenure of property in the ante-Norman period is given by Professor Stubbs, and I can do no better than quote that learned author *in extenso*. Professor Stubbs⁴ says, "In the obligation of military service may be found a second strong impulse toward a national feudalism. The host was originally the people in arms—the whole free population, whether land-owners or dependants, their sons, servants and tenants. Military service was a personal obligation; military organisation depended largely on tribal and family relations; in the process of conquest land was the reward of service, the service was the obligation of freedom of which the land was the outward and visible sign. But very early, as soon perhaps as the idea of separate property in land was developed, the military service became not indeed a burden upon the land, but a personal duty that practically depended

¹ Feuds, etc., p. 4.

² Gavelkind, p. 104.

³ Cecil, Primogeniture, p. 29.

⁴ Constitutional Hist., Vol. I, pp. 189, 190.

on the tenure of land ; it may be that every hide had to maintain its warrior ; it is certain that every owner of land was obliged to the Fyrd or expedition ; the owner of Bockland was liable to the *trinoda necessitas* alone ; the occupier of Folkland was subject to that as well as to many other obligations from which Bockland was exempted." Military duty was the duty of every landowner and there is but a narrow gap between the personal and this kind of military service, which was as much a landowner's duty as it is now, and the one which was annexed as a condition of tenancy held from a Feudal lord.¹

Yet the tenure of land in England previous to the Norman conquest did not present any of those characteristics which afterwards so closely connected it with the law of Primogeniture. The old custom of Gavelkind according to which in the event of intestacy the property of the deceased was divided among his children, or at all events among his sons, in equal portions, was the rule of succession before the Conquest. Moreover the right of testamentary disposition, incompatible with the duty of Feudal tenant either to his lord or to his offspring, was fully recognised before the feudal era. *Alienation *inter vivos* was equally permitted and the restrictions on alienation which afterwards hampered the owner of a fief were unknown in the pre-Norman days.

Although before the conquest, the tenure of land in England was not accompanied by any of those understandings or obligations by which it subsequently came to be connected with the rule of Primogeniture, yet the system in existence in those days must have gone far to prepare the minds of the people for the changes which the conqueror introduced. " Before the

Pre-Norman law of inheritance.

Conqueror's task, how became easy.

conquest the land-owners were subject to military duties, and to a soldier it would matter very little whether he fought by reason of tenure or for any other reason. The distinction between his services being annexed to his land and their being annexed to the tenure of his land would not strike him as very important.”¹ William’s policy after conquest was not to allow the old practices of equal partition among all the children to continue, and fortunately for him he did not find in England a soil altogether uncongenial for his policy to take root in. His policy was that the rule of Primogeniture should develop under his pilotage and it was the Feudal system which so well sheathed it. There was no one moment at which this Feudal system can be said to have been introduced upon an unwilling country. He caused the land to be divided into military tenures, or tenures by Knight’s service, and civil tenures or tenures of Socage land. In regard to the latter, the conqueror did not in any way disturb the rule of inheritance. Such land descended to all the sons, continuing to be divided as had been the rule before the conquest, and there is a law of the conqueror expressly confirming in its case the course of descent by division. “*Si quis intestatus obierit liberi ejus hereditatem acqualiter dividunt*” was the law of inheritance for such land. But military tenures stood on a different footing altogether. “In a time of disquiet, with a fear of enemies from without and insurrections from within, the inconvenience of allowing all the sons to succeed to equal shares in a military tenure were obvious. Continual sub-division and parcelling out of military tenures was a source of weakness to the organisation for the defence of the kingdom.” People were alive to the requirements of the situation and they could not be opposed to the unification of the holdings which alone seemed to solve the difficulty. It was partly due to this that William could easily persuade his Great

Council¹ to take the oath of allegiance, or to pass the laws, by which the Feudal System on the Continent obtained some hold in England.²

It may be noticed at this point the characteristic of the English Feudalism thus introduced by the conqueror that distinguishes it from the Continental Feudalism and English feudalism contrasted. A powerful ruler like William, who had had abundant experience of the tendency of Continental Feudalism to make the Vassal a formidable rival to the king, was not likely to throw away the existence of a principle forming an important aid to the Central authority and

¹ The law respecting the introduction of Feudal tenures was passed "*per commune concilium*."

See Wright's "Tenures," p. 63.

Also Hale's "Common Law," p. 311.

See Lawrence, Primogeniture, pp. 33-35.

Cecil, Primogeniture, p. 31.

² With regard to the oath at Salisbury, Prof. Stubbs observes :—

"In this act has been seen the formal acceptance and date of introduction of Feudalism, but it has a very different meaning. The oath described is the oath of allegiance, combined with the act of homage, and obtained from all land-owners whoever their Feudal lord might be. It is a measure of precaution taken against the disintegrating power of Feudalism, providing a direct tie between the sovereign and all freeholders, which no inferior relation existing between them and the mesne lords, would justify them breaking." Constitutional Hist., Vol. I, p. 266.

The law introducing the Feudal system runs as follows :—

"Statuimus etiam et firmiter praecepimus ut omnes comites barones milites et servientes et universi liberi homines totius regni nostri habeant et teneant se semper in armis et in equis ut decet et oportet et quod sint Semper prompti et bene parati ad servitium Suum integrum nobis explendum et peragendum, cum semper opus fuerit, secundum quod nobis de feodis debent et tenentur tenementis suis de jure facere et sicut illis statuimus per commune concilium totius regni nostri, et illis dedimus et concessimus in feodo jure haereditario."—Quoted in Hale's Common Law, p. 311.

found in the Anglo-Saxon *trinoda necessitas*. It has been seen that before the conquest the whole land was subject to the burden of the *trinoda necessitas*. After the conquest this burden came to be regarded as a service due to the king quite irrespective of the fact whether the landholder bound to render it was the king's tenant or not. This was ensured by the famous oath taken by all landholders at the Council of Sarum in 1086, when there came to the conqueror "his witan and the land-holders that were throughout England, and they became his men, and all submitted themselves to him and were his men, and swore fealty to him, and that they would defend him against all other men."¹

Here we might notice another class of tenures known as honorary Feuds which carried with them titles of nobility and became incapable of division. They supplied an example which, in the then State of Society, it was convenient to follow. The rule of descent in them, with their accompanying title, was naturally to the eldest son, he being the first of his generation able to perform the *duties* of military service. These honorary Feuds obtained a fresh stimulus from the Continent at the famous constitution of the Emperor Frederick Barbarossa who established divisible and indivisible Feuds throughout his dominions, the indivisible mostly carrying with them a title. The Emperor prescribed that the rule of Primogeniture was to apply to their descent.²

¹ Stubbs, p. 81.

Compare Laws of William I, Cap. 2: "Statuimus etiam ut omnis liber homō foedere et sacramento affirmet, quod infra et extra Angliam Willelmo regi fideles esse volunt, terras et honorem illius omni fidelitate cum eo servare, et ante eum contra inimicos defendere."

See Freeman, Norman Conquest, Chapter V, pp. 64, 366.

See also Digby, Hist. Real Prop., Chapter I, pp. 35-36.

² Cecil, Primogeniture, p. 32.

Wright, Tenures, pp. 31, 175.

Indeed the custom of Primogeniture was not introduced into England in imitation of Emperor Frederick's honorary Feud. There had been very distinct traces of primogeniture in England considerably before his time. Earldoms and baronies, which that ordinance chiefly relates to, had before been indivisible, both in England and in France. Yet this constitution was not without influence on the development of the law in England. It has indeed, been contended by some writers that fees held by Knight's-service were not originally 'Feuda Individua'; and that even in case of these lands the law of Primogeniture was of somewhat later growth. Hale and Somner point to the above constitution of the Emperor as establishing that principle of descent; and they seem to think that it was only after this constitution that Primogeniture became general in the English system. But any constitution of Frederick could in England have had no other influence than that of a model; and a similar model was also to be found in the customs which prevailed among the holders of benefices at a period considerably anterior to the conquest. Yet the establishment of honorary Feuds must doubtless have greatly contributed to the rapid spread of Primogeniture.¹

At about the same period the laws of Henry I decreed that "Primum patris feudum primogenitus filius habeat,"—that the eldest son was to succeed to the 'capital fee' or principal feud, including the principal mansion of his father's military possessions. How far these laws of Henry I were, in general, enforced or followed must remain uncertain.² But a surer information is available for the next stage. Glanvill, the well-known writer of the time of Henry II says, "Cum quis ergo haereditatem habens moriatur,

The laws of Henry I and traces of Primogeniture.

Primogeniture in the time of Henry II.

¹ Lawrence, Primogeniture, p. 36.

² See Reeve's History of English Law (Finlason), Vol. I, p. 254.

si unicum filium haeredem habuerit, indistincte verum est quod filius ille patri suo succedit in toto. Si plures reliquerit filios, tunc distinguitur utrum ille fuerit miles, sive per feodum militare tenens, aut liber sokemannus. Quia si miles fuerit, vel permilitiam tenens, tunc secundum jus regni Angliae primogenitus filius patri succedit in totum; ita quod nullus fratrum solum partem inde de jure petere potest.”—“When therefore any one who holds an inheritance dies, if he has only one son, it is without reserve true that that son is the successor of his father in the whole inheritance. If he has left more sons than one, then there is a distinction whether he was a knight, or a tenant of a knight’s fee or a free socman. Because if he were a knight or a tenant by knight’s service, then according to the law of England the *first-born* son succeeds his father in the whole inheritance, so that none of his brothers can demand of right any share therein.”¹ Socage or civil lands were as of old divided among all the sons, provided that the land had been subject, by ancient custom, to division: “Si vero fuerit liber sokemannus, tunc quidem dividetur haereditas inter omnes filios, quotquot sunt, per partes aequales, si fuerit socagium illud antiquitus divisum.” But even in this case there was a proviso saving to the eldest son the chief messuage in consideration of the dignity due to his seniority. He must however make its value good to others out of other property.² If however there was no ancient custom of division then “primogenitus secundum quorundam consuetudinem totam haereditatem obtinebit, secundum autem quorundam consuetudinem postnatus

¹ Digby, Hist. Real. Prop., pp. 95-98.

Reeve’s Hist. of English Law (Finlason), Vol. I, p. 254.

White—Outlines of Legal History, p. 166.

² “Salvo tamen capitali mesuagio primogenito filio pro dignitate aesneciae suae; ita tamen quod in aliis rebus satisfaciet aliis ad valentiam.”

Digby, Hist. of the Real Property, p. 96.

filius hæres est!":—then "the first-born son according to the custom of some places will get the whole inheritance, while according to the custom of other places the youngest son is the heir."

Thus in the interval between Henry I and Henry II Primogeniture had surely made a marked stride.¹ There was hardly any means open to the people to defeat the rule, wills being as yet unknown except in Gavelkind lands. As yet the right of representation is not settled. "When any one dies leaving a younger son and a grandson, the son of a predeceased eldest son, there often arises a great question as to the law which of the two should be preferred to the succession, that is to say, whether the younger son or the grandson. For some used to be of opinion that the younger son was the rightful heir rather than the grandson, apparently on the ground that the first-born son, not having survived his father, never actually became his heir, and so the younger son having survived both his father and his brother rightly in their view succeeds his father. Others however think that the grandson ought of right to be preferred to his uncle. For since the grandson is the issue of the eldest son, and is the heir of his body he ought to succeed to all the rights which his father would have had if he had been still alive."² The other seems to have been the opinion of Glanvill himself and the claims of children of elder brothers in preference to their uncles were indisputably settled in the days of Bracton.

¹ Reeve's Hist. Eng. Law, Vol. I, p. 255.

² This latter is also Glanvill's own opinion. *Cum quis autem moriatur habens filium postnatum, et ex primogenito filio præmortuo nepotem, magna quidem juris dubitatio solet esse, uter illorum preferendus sit alii in illa successione, scilicet utrum filius an nepos. Quidam enim dicere volebant filium postnatum rectiorem esse hæredem quam nepotem talem, ea videlicet ratione, quia filius primogenitus cum mortem patris non expectaret, nec expectavit quosque hæres ejus esset, et ita cum postnatus filius superviveret tam fratrem quam patrem, recte ut dicunt*

It will be useful to remember what Reeves says about the right of representation and collateral succession. "The right of representation," Reeves, says,¹ in prejudice of proximity of blood, though, perhaps, not an unlikely consequence of the legal notion of primogeniture, did not so soon establish itself. The mind of men revolted at a rule which gave the inheritance to an infant, only because he represented the person of his father, in exclusion of the uncle, who was nearer of blood to the grandfather, from whom the fee descended; especially when regard must be had to the calls of military service, which an infant tenant was not capable of performing. If to these considerations we add the little tenderness that was shown to the titles of such feeble claimants in those days of violence and oppression, we can easily account for the slow progress which was made towards establishing the right of representation." "With all these reasons against it, representation was not admitted as a rule of descent, even so low down as the reign of Henry II."

"As the descent of Crowns kept pace with the descent of private feuds, we may, from this doubt in be able to account for the conduct of King John in excluding his nephew Arthur from the throne: and from the different opinions which were then held concerning it we may collect, that he had some color of right and law for what he did, the rules of inheritance as to the point then in question not being precisely ascertained and settled. In France, where the right of

patri succedit. Aliis vero visum est nepotem talem de jure avunculo suo esse præferendum. Cum enim nepos ille ex filio primogenito exierit, et de corpore suo exstiterit hæres, in totum jus quod pater suus, si adhuc viveret, haberet, ipse patri suo succedere debet."

See Digby, pp. 99-100.

Also Reeve's *Hist. English Law* (Finlason), Vol. I, p. 255.

Reeves, *Hist. Eng. Law* (Finlason), Vol. I, pp. 255-56.

representation had more generally obtained, that king was clearly esteemed an usurper; and as such, his title denied and opposed.....At what precise time these doubts were removed, and representation became universally regarded as a rule of descent, can only be conjectured. Probably, in the latter part of this very reign, when such a notorious event was recent, and had brought the subject under examination, our law of descent received this new modification from the Continent."

As to the rule of collateral succession Reeves says that the history is involved in equal obscurity. Rule of Collateral succession. Glanvill tells us: "*Deficientibus autem hiis qui recta linea descendunt, tunc frater vel fratres succedunt: aut si non reperiantur fratres, vocandae sunt sorores; quibus praemortuis eorum liberi vocantur; post hos vero vocantur avunculi et eorum liberi; postremo materterae vel earum liberi; habita et observata distinctione superius praenotata, inter filios militis et filios sokemanni et nepotes similiter; habita quoque distinctione inter masculos et feminas.*"—"On the failure of lineal descendants the brother or brothers will succeed, or, if there are no brothers, then the sisters come in; if these are pre-deceased their children are next in order, and after these the uncles and their children, and in the last place aunt and their children, bearing in mind the distinction above explained between the sons of a knight and the sons of a soc man, and the grandsons in like manner, observing also the distinction between males and females."¹

We have seen above that in the days of Glanvill the Primogenitary rules did not obtain for all lands in the kingdom. Only lands held by knights' service descended exclusively to the eldest son. This was not the case with socage lands, though socage was also a free tenure. "The tenant in socage was allowed to alien by deed of feoffment at an early age; his land did not escheat in the event of attainder; he was

¹ See Digby, p. 97-100.

permitted a customary right of testamentary disposition; and on intestacy his estate, up to the reign of Henry II, when the devolution of socage land was assimilated, except in Kent, to that of the estates held by military tenure, was equally divided among all the sons."¹

But even in John's reign, the presumption in Socage tenures had been in favour of the eldest son unless a custom could be proved to exist to the contrary. We are told that Gilbert de Bevill brought a Writ of right *de rationabili parte* against William his elder brother for lands in Gunthorpe, in Rutlandshire, *quae eum contingunt de socagio quod fuit patris eorum in eadem villa*; William pleaded *quod Socagium illud nunquam partitum fuit nec debet partiri, et hoc offert defendere*. William's contentions were upheld because Gilbert the demandant produced no proof of the partibility.² What was merely a presumption soon became the law, and Digby³ tells us, referring to the passage of Glanvill quoted above, that "the law as to the descent of socage estates, as stated in this passage, though still traceable in Bracton, before long became obsolete, and the same rules as to descent prevailed in lands held in Socage and by Knight's-service. The equal division of lands amongst all the sons only continued as a local custom in certain boroughs, and in the County of Kent, where it is still the rule. "Traces of the law in Henry II's time are to be found in that of Henry III also, but generally speaking Primogeniture had almost entirely been the rule of succession even in case of Socage lands in imitation of those held by Knight's service."⁴ The distinction was completely lost in the reign of Edward I. It is not possible to say with definiteness as to

¹ Lawrence, *Primogeniture*, p. 36.

² Robinson's *Gravelkind*, p. 32, Cecil, *Primogeniture*, p. 36.

³ Digby, p. 95.

⁴ Cecil, *Primogeniture*, p. 36.

when and how the distinction was removed. It seems to have crept in insensibly and by degrees, in imitation of the descents of Knight's service lands, the owners of Socage—tenements choosing rather to deprive their younger sons of their customary share of the inheritance, than that their elder son should not be in a condition to emulate the state and grandeur of the military tenants.¹

Whatever that be, the history of Primogeniture in England is indeed bound up with military tenure; it was to this that Primogeniture owed its first great impulse, and it is to this again that we must look for its further history.

Before proceeding further an examination of the characteristic incidents of Knight's service that have obtained from the earliest times becomes necessary, and any careful examination of these incidents would lead us to conclude that they necessarily involved the descent of, at all events, the capital fee to the eldest son alone. Among the incidents of a military tenure the most important and regular consisted of a contribution to the expenses incurred by his lord in making his eldest son a Knight, and providing a marriage portion for his eldest daughter. Glanvill tells us "Now after an agreement has been made between the lord and the heir of his tenant as to giving and accepting a reasonable relief, the heir may require from his own tenants reasonable aids for the purpose. He must however do this reasonably, in proportion to the size of their fees and their means, so that they may not seem to be too heavily burdened on that account, or be made to forfeit their tenements. Now there is no fixed limit ordained as to the amount of aids of this kind which may be given or required, except that the rule above mentioned is to be kept inviolate. There are, besides, other cases in which it is lawful for a lord to require similar aids from his tenants subject to the abovementioned

¹ Robinson, p. 28.

Wright, Tenures, p. 178.

rule ; for instance, upon the occasion of his son and heir being made a Knight, or upon the marriage of his eldest daughter. But whether lords could require aids of this kind from their tenants for the maintenance of their private wars, I doubt. The obligation was confined to the knighthood of the eldest son alone ; and this might indeed be regarded as in itself almost a sufficient proof that the latter alone succeeded to the tenure. Glanvill in fact says so, as he speaks of the knighthood of the son and heir. It was really in the interest as well of the king as lord paramount, as of the mesne lords that this provision was established, in order that there might be no lack of duly qualified persons for the defence of the State, as well from internal disorder as from foreign foes. The other aid seems to have been devised so that the heir might receive an unencumbered inheritance and thus efficiently perform his duties. No portion for his sister was allowed to be charged upon the land ; the inferior tenant like the Roman client, was expected to contribute for the purpose.¹

“Of all the incidents of knight’s service, that which most closely connected it with the rule ‘of Primogeniture, consisted in the fines which were levied on alienation of the land.” Originally the relation of the lord and his tenant had been intensely domestic. Neither the lord nor vassal could in early times break the feudal bond which subsisted between them, except by mutual consent.² The tenant could not transfer his tenancy so as to bring in a stranger without his lord’s consent. The lord too could not transfer or exchange his ‘seignior’ so as to compel a tenant to perform the services to a stranger and accordingly a new lord could not enter upon his predecessor’s rights except on the voluntary attornment of the vassal. The relation however soon became less mutual and the holder of seignior’ or a reversion

Right of alienation.

¹ See Lawrence, *Primogeniture*, p. 37.

² Wright, *Tenures*, pp. 30, 31.

was permitted to convey his privileges by levying a fine, without the tenant's concurrence; attornment could, by this process of levying a fine, be compelled, until a statute of Anne rendered it no longer necessary.¹ The tenants' right of alienation however did not develop with equal rapidity. His interests were somewhat antagonistic both to his lord and to his heir.² The king or the superior lord became jealous for the proper performance of his tenant's military service; the tenant was anxious to escape the burdens which had sprung from its abuse. If he wished to dispose of part of his tenancy by selling it to different purchasers his lord was opposed to him, because, among other reasons, though it did not deprive the lord of the military service of his tenant, yet the service became more difficult of enforcement from a number of small vassals. His own heir was opposed to him, because the heir was trained up in the spirit of the feudal law that he himself should succeed. He had thus to fight a double fight and "eventually from the strict restrictive tendency against alienating his land which weighed upon him immediately after the conquest he has obtained after tangled vicissitudes and reactionary swings of the pendulum, a complete right of alienation both against his lord and against his own heir. The vested right of Primogeniture in his heir which was characteristic of the Middle Ages has been curtailed and has dwindled away, until at length the modern heir retains no right at all, and only acquires a property if his father or predecessor conforms to a received custom or dies intestate."³

It will indeed be beyond our purpose to give an account of the intricate legal manoeuvres by which the tenant's right of

¹ Lawrence, *Primogeniture*, p. 39. St. 4 and 5 Anne, c. 16, s. 9. See Williams, *Real Property*, p. 239.

² See Reeve's *Hist. Eng. Law* (Finlason), Vol. I, p. 257.

³ Evelyn Cecil, *Primogeniture*, p. 37.

See also Reeve's *Hist. Eng. Law* (Finlason), Vol. I, pp. 257-58.

alienation developed; nor would it be quite in keeping with our aim if we proceed to examine the reason why its growth was so much opposed. Yet any sketch of the history of Primogeniture in England can scarcely afford to do without some glance at them. It has already been remarked that the keen objection to alienation by his tenant which the feudal lord raised was a natural consequence of the feudal system, and particularly of that form of it which was introduced in England by the policy of the Conqueror. The mesne lord was himself held to a strict performance of services by his superior; and his capacity for rendering them was liable to be seriously endangered by an excessive multiplication of the number of his tenants. The land began to be regarded less as a means of subsistence than as a security for defence; and if a tenant were permitted to divide his estate, its efficiency in this respect was seriously diminished. The holder of knight's fee was bound to serve his sovereign for forty days in the year, and to furnish his equipment at his own expense; but those who held only a portion of a fee were only required to serve for a proportionate time. "Hence the splitting of Feuds had the defect of inconveniently increasing the number of the forces at the commencement of a campaign, and of so limiting the duration of their service, that they became useless for anything, unless it might be attempted by a coup de main. The quality of the feudal militia was also much deteriorated by the sub-division of fiefs: the holder of small portions not being able to furnish completely equipped horsemen even for the shortest period."¹

Yet alienation by feudal tenants must have begun soon after the conquest as will be obvious from the large number of instances in Domesday Book in which maneria described as part of the estates of the king's tenants in capite are held of them by named under-tenants. During the early years however,

¹ Littleton, Henry II, Vol. III, pp. 83-92.
Lawrence, Primogeniture, p. 41.

the alienation was rarely accomplished by a transfer of all the owner's rights in the land, but was usually affected by subinfeudation by which lands were granted to be held by the purchaser as tenant of the Vendor.¹ So that while they remained tenants of their lord, they themselves became the lords of their under-tenants. The original lord, however, for various reasons, some of which have already been hinted at, soon began to detest this practice. It was undoubtedly more satisfactory to get forty days' service out of one tenant, than to make up the forty days out of several under-tenants, ten days from one, two days from another, and so on, according to the proportionate share of their tenancies. Besides subinfeudation deprived the lord of several much prized feudal privileges, as the Feudal dues of the under-tenants belonged in the main to the tenant of the lord and not to the lord himself. The difficulty of military service was keenly felt and removed by Magna Carta (1217), C. XXXIX, which laid down: "Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terræ suæ possit sufficienter fieri domino feodi servitum-ei debitum quod pertinet ad feodum illud." "No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him which belonged to the Fee."² The second difficulty however, namely that of preventing the Feudal privileges from being enjoyed by the middlemen could only be removed by the total abolition of subinfeudation. By the Statute 18 Edw. I, C. I, the statute of *Quia Emptores*,³ liberty was given to every freeman to sell his holding or part thereof as desired by him so that the alienee

¹ William, Real Property (Ed. 21), p. 38.

² Digby, p. 133.

³ *Quia Emptores* did not apply to King's tenants *in capite* who did not acquire a clear right of alienation except by royal license till 1327 (1 Edw. III, St. 2, C. 12). Digby, Hist. Real Prop., p. 236.

should hold the land of the same immediate lord and by the same services as his alienor. The aim of the Statute was stated to be the removal of the second difficulty named above ;¹ and it created the right of alienation of the tenant. The middle lord vanished ; the Free-holder could no longer make himself a mesne lord. "The great-men of the realm" opposed the tenant's power of alienation, and subinfeudation originated. At the instance of these great men of the realm again the subinfeudation must die but only to secure right of alienation the need of which gave its birth. The subinfeudation is abolished *ad instantiam magnatum regni sui*, and it was at their instance *Dominus Rex in parlamento concessit, providet, et statuit*, that from henceforth it "should be lawful to every freeman to sell at his own pleasure his lands and tenements or parts of them," only "the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

The table seems to have turned completely in the days of Bracton who declares the tenants to be the real proprietors

¹ "Quia Emptores terrarum et tenementorum de feodis magnatum et aliorum in praejudicium eorundem temporibus retroactis multotiens in feodis suis sunt ingressi, quibus libere tenentes eorundem magnatum et aliorum terras et tenementa sua vendiderunt, tenenda in feodo sibi et haeredibus suis de feoffatoribus suis et non de capitalibus dominis feodorum, per quod iidem capitales domini escaetas, maritagia, et custodias terrarum et tenementorum de feodis suis existentium saepius amiserunt, quod quidem eisdem magnatibus et aliis dominis quam plurimum durum et difficile videbatur." For as much as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the Freeholders of such great men have sold their lands and tenements to be holden in fee of their Feoffors and not of the chief lords of the Fees, whereby the same chief lords have many times lost their escheat, marriages and wardships of lands and tenements belonging to their Fees, which thing seems very hard and extreme unto those lords and other great men.

of the fee. "But as regards the power of the donee," says Bracton, "to make a gift over and to transfer to another the property granted to himself, some might say that he cannot do so, because by this means the lord loses his services; this however is not true with all respect to the chief lords be it said. And speaking generally, the truth is that the donee may grant the property and the land granted to him to whomsoever he pleases, unless there were some special provision¹ against alienation at the time of the Feoffment... Hence when any chief lord hinders his tenant from making a gift, he works him an injury and an open disseisin, in not suffering him to make use of *his own property* and his own Seisin. The tenant however by such a gift works no wrong to his lord, although he does him harm; since the lord may have his relief from the feoffee of the tenant.....Further if the lord allege that the tenant has wrongfully entered upon his fee, I say it is not so, because the *Fee is not the property of the lord but of the tenant*, and the lord has nothing in the Fee except the services due to him, and thus the fee ~~is~~ the property of the tenant, but subject to services to the lord." ²

¹ By the time of Littleton this condition imposing a restraint on alienation was held illegal.

Digby, Hist. Real Prop., pp. 158-160.

² Bracton, lib ii., cap. 19, Fol. 45: "Sed posset aliquis dicere quod ex hoc quod donatorius ulterius dat et transfert rem donatam ad alios, quod hoc facere non potest, quia per hoc amittit dominus servitium suum, quod quidem non est verum, salva pace et reverentia capitalium dominorum. Et generaliter verum est, quod donatorius rem et terram sibi datam donare poterit cui voluerit nisi ad hoc specialiter agatur in possessione ne possit.....et unde cum quis capitalis dominus tenentem suum impedierit quod dare non possit, facit ei injuriam et disseisinam apertam, ex quo illum re sua et seisinam uti non permittit. Tenens vero nullam facit injuriam domino suo ex tali donatione, quamvis damnum, cum ipse dominus habere possit relevium de suo feoffato et ejus haeredibus, et licet damnum facit non tamen injuriosum erit praedicta ratione...

Inroad upon the interest of the heir seems to have been made even earlier. For Glanvill tells us "every free man being a tenant, may give with his daughter or any other woman a certain part of his land by way of marriage gift, whether he has any heir or not, and whether the heir consents or not, nay even contrary to his express desire and protest. Anyone also may give to whomsoever he pleases any part of his free tenement by way of remuneration for services, or in favour of a place of religion by way of free alms."¹ A larger right of alienation seems to have been enjoyed over lands which a man had acquired by *purchase* than over those of which he had become possessed by inheritance.² The first advance in this direction seems to have been made by the Seventieth law of Henry I which, while maintaining the inalienable character of Bookland,³ expressly allowed every freeman to dispose as he pleased of lands he had himself acquired: "*Acquisitiones Suas det cui magis Velit: Si Bocland autem habeat quam ei parentes sui dederint, non mittat eam extra cognationem suam.*"⁴ But even in the case of purchased lands a tenant in fee could not

...Item si dicat quod injuste ingressus est feodum suum, dico non, quia non est feodum suum in dominico sed tenentis illius, et dominus nihil habet in feodo nisi servitium, et sic erit feodum tenentis in dominico, et feodum domini in servitio....."

¹ Digby, pp. 101-103.

"Potest itaque quilibet liber homo, terram habens, quandam partem terrae suae cum filia sua vel cum aliqua alia qualibet muliere, dare in *maritagium*, sive habuerit haeredem sive non; velit haeres, si habuerit haeredem, sive non velit; immo etiam eo et contradicente et reclamante. Quilibet etiam, cuicumque voluerit, potest dare quandam partem sui liberi tenementi in remunerationem servitii sui vel loco religioso in *elemosynam*."

Glanvill, VII, c. 1.

² Williams, p. 61.

³ See Digby, pp. 11 to 15.

⁴ See Digby, p. 101.

by alienation entirely disinherit an heir sprung of his own body, though he might defeat the expectation of his collateral heirs. "If however he who wishes to make a gift of a portion of his land have nothing but land which he has purchased, he may indeed do this, but not to the extent of the whole of the purchased land, because he may not disinherit the son who is his heir. However if there be no son or daughter begotten of his body, he may then give any part of his purchased land to any one he pleases, or the whole of it, for an estate of inheritance."¹ But a current had set in favour of the right of alienation. Originally a grant of land to a man and his heirs gave his heir a substantial interest in the land not capable of being defeated by an act of the man. We have seen above how the restriction began to be relaxed. It was the interest, especially, of Deans and Chapters and of Abbots and Priors and their convents, to make an inroad, and in those days ecclesiastical influence was irresistible. In cases of such grants no temporal services could be reserved, and the only personal comfort the heir could derive was that his soul would be prayed for by the grantees. The grant in Frank-marriage also deprived his heirs of all feudal services, except a phantom oath of fealty for three generations of her descendants. Yet a harder fate awaited the heir, and in the reign of Henry III the son wholly disinherited by his father's alienation was denied any remedy at law.² Bracton writing in the same reign lays down that in the case of a gift of land to a man and his heirs, the donee acquired the land by gift, and

¹ Digby, p. 104.

Si vero questum tantum habuerit is qui partem terrae suae donare voluerit, tunc quidem hoc ei licet, sed non totum questum, quia non potest filium suum haeredem exhaereditare. Veruntamen si nullum haeredem filium vel filiam ex copore suo procreaverit, poterit quidem ex questu suo cuicumque voluerit quandam partem donare, sive totum questum haereditabiliter. (Glanvill.)

² Williams, p. 69.

his heir after him takes by succession, but acquires nothing therein by the gift. His birth was simply the condition which rendered it absolute: "*nihil acquirit ex donatione facta antecessori, quia cum donatorio non est feoffatus.*"¹ It is clear that when all grants began to be construed in this manner the heir's rights were in theory gravely imperilled.

However dangerous the possessor might have been to his heirs during his life-time, he was not so to his successors at his death. Ever since the Norman conquest he had been unable, as an almost universal rule, to make a will,² so as to have his land to a usurping relation, a stranger or a charity. In time of Bracton³ there seems to have been made attempts to devise lands by delivering it to "a man and his heirs or to whomsoever he might give or devise the land." But Bracton declares against such a power. It will be beyond our purpose to trace here the origin and growth of the testamentary power in England. All that we should remember is that this barrier also was destined to be broken down, and the privileges of the heir infringed. The undermining was gradual: "neither in the British Constitution nor in early English law was it the custom to do things outright; but it came to be recognised, probably sometime during the later Plantagenets, that a man might give over his land during his life-time to certain persons, to the "use" of whatever successor he might appoint by his will. This backstairs method of devising land by will was a lichen growth, and it was not long tolerated. The statute of

¹ Williamc, p. 69.

Digby, Hist. Real Prop., pp. 165-171.

Also Lawrence, Primogeniture, pp. 47-48.

² See Digby, 102 note, "*Si vero donationem talem nulla sequuta fuerit seisinā, nihil post mortem donatoris ex tali donatione contra voluntatem hæredis efficaciter peti potest.*" A deathbed gift is also not allowed, Digby 192, note 2.

³ Bracton, lib. ii, cap. vi, fol. 17. Digby, p. 168.

Uses swept it away at a blow, and once more there was no means by which lands could be left by will away from the heir. Yet the world of Henry VIII's time was not that of the early Normans, and so quickly was the inconvenience felt that only five years later the devise of lands by will was expressly sanctioned. Two-thirds of Knight Service land and the whole of an estate of Socage land might be left away from the eldest son; and a century afterwards when military tenures had become an anachronism, and their burden, a preposterous grievance, they were finally abolished by the resolution of the Long Parliament, and former military tenures became divisible in their entirety as Socage lands. This law has not been altered and an eldest son is not now entitled to be left a bit of his father's possessions. Primogeniture died but was soon to reappear as a custom put in practice by means of entails and settlements."¹

It would indeed be tedious and hardly relevant to examine in detail the history of the law of entails. Yet a short review will not be quite out of place, as, for a period, primogeniture mainly depended upon these entails, though of course these entails are in theory quite dissociated from primogeniture, as estates might as well be entailed upon the younger as upon the eldest sons.

The question whether entails were known to the Roman law has already been given some consideration, and it has been seen that though the system of tying up estates by means of settlement is of quite modern origin, yet the thing might not have altogether been unknown in the ancient days. The Roman proprietor of the Imperial period was protected in his efforts to prescribe the devolution of his property through more than one generation by creating a series of life interests and remainders. We have seen how in their military testament, the Roman testators were permitted to control the posthumous

devolution of their property to an extent not then conceded to the civilian and how the heir under such a testament might be confined to a life interest, another being substituted to whom the property was to go on its expiration. Wills of this kind doubtless suggested the idea of utilising the method of devising on trust, or by Fideicommissa for a similar purpose.¹ The Fiduciary heir was generally required to leave the property to such person as, at his demise, should be his own heir, according to the law of intestacy, or sometimes, the heir of the original testator, the Fiduciary himself having only a life interest without any power of disposal otherwise than according to the instructions he had received. At one time it seems to have been possible to create a series of successive life estates in the foregoing manner; but the policy of Justinian abhorred perpetuities, and the 159th Novel decreed that the restrictions should not proceed beyond the person who takes by appointment from the first Fiduciary.²

The system of entailing prevailing in English law has a history of its own. The well-known statute *de Donis* first established strict entails here in the English system. It was passed five years before *Quia Emptores*, a statute which, we know, was passed at the instance and for the convenience of the barons. The land which fell under *de Donis* and was thus permanently withdrawn from the market, is probably considerably less than is generally supposed. Yet the inconvenience of the statute began soon to be felt, and as Blackstone would say, "children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; creditors were defrauded of their debts."³ Yet these evils had to be borne

¹ Buckland, *Principles of Roman Law*.

² *Restitutio Fidei-Commissio Usque ad unum gradum* constant.

³ See Bacon, *Treaties on the Use of Law*.

for nearly two centuries till about the reign of Edward IV that pious fraud, a common recovery, was devised, and entails became liable to be 'barred.'¹

Much has been heard against primogeniture in recent days. Yet it cannot be denied that English mind must have been a stronghold for the institution. It will be important to note that though law placed the prerogative of the eldest son beyond the parent's control and maintained the principle of hereditary succession to ancestral property in all its strictness, yet, from the day when De Donis received the royal assent, neither king, nor Barons, nor commons introduced any legislative proposal for its modification. The method by which in 1473 entails were for the first time barred, and the expectation of the heir defeated was, as is well known, the result not of an enactment by the Parliament but of a decision of the Judges.² The decision itself only admitted a principle that was fair enough, but this principle of recompense in value was afterwards so extended as to overturn the statute de Donis altogether. We shall not proceed to examine in detail the progress of the method. It should only be remembered that such a piece of solemn juggling as was involved in this method of barring the entails could not long have held its ground, had it not been supported by its substantial benefit to the community. The progress of events was not opposed to it, but tended only to make that certain which at first was questionable, and the proceedings under the name of suffering common recoveries maintained their ground and long continued in common use as the undoubted privilege of every tenant-in-tail, the right to suffer a common recovery being considered as the inseparable incident of an estate tail, every attempt to restrain which would be

¹ See Williams, p. 95.

² Taltaram's case, Y.B. 12 Edw. IV. 19. Tudor's Leading Cases on Real Property, p. 695.

Williams, p. 95.

void.¹ Nay, not only this, the necessity for barring the entail was so felt that in course of time another, an additional method of doing the same thing was discovered which was as effectual in defeating the claim of the issue, though it was inoperative as to the remainders and reversion.² Things went like this until the public opinion could prevail in the legislature and the legislature by Statute 3 and 4 Will. IV, C. 74, abolished the whole of the cumbrous and suspicious-looking machinery of common recoveries and 'fines' and substituted in their place a simple deed executed by the tenant-in-tail and enrolled as required by the statute.

Strict and continuous entails have thus been long abolished; yet it has not died altogether. There is something in human psychology which still keeps it alive and this time by way of family settlement. True, every tenant in possession soon gets full dominion over the property with freedom to dispose of it in any way he likes. Yet he seldom likes to keep it unsettled or to settle it in a manner not contemplated by the ancient strict entails. Free he is, but he utilizes his freedom in doing the same thing which an ancient forefather would have desired to bind him to do. The aim of strict entails was to preserve the property. Strict entails were gone, yet property is preserved in family. Primogeniture as a right dies, but is immediately restored to life as a custom.

¹ Williams, 97-98.

² "A Fine," Williams, p. 99.

CHAPTER III.

PRIMOGENITURE IN SCOTLAND, IRELAND, THE UNITED STATES, AND THE COLONIES.

The History of Primogeniture in Scotland is more akin to that in the sister country than anywhere else, though the History of Property itself seems to have passed through the same stages here as in any other country. Here, as in many other countries, the history begins with the nomadic period, a period whose dreamy antiquity is hidden away in pre-historic mists. At this age the greatest part of the earth's surface was neither cultivated nor cultivable and the division of such land which would have no value was not at all thought of. The only purpose to which it could be put was that of common pasture. In course of time, however, there arose agrarian communities, and the first property in land was acquired by such communities. It will be beyond our purpose to stop here to re-open the controversies as to whether everywhere property in land first arose as the communal property, and if so, what must have been the reason for this. There are scholars like Belot who has disbelieved the theory of the priority of collective property, and has given an account of the growth making collective property only the extension of individual property to a family more or less large. No doubt there are countries like Polynasia and Melanesia where people are hardly out of the state of tribal community; yet we find individual property in land. In Australia, New Caledonia, at Viti and Tihiti the social state is still in infancy; yet we find private property in land, and certainly there is not a sufficient development of civilised conditions to justify the appearance of private property. Nevertheless

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Scotland.

the general belief is that this kind of property has arisen, making a notable exception to the rule of the primitive world. Examples are still extant of primitive property among uncivilised people, and examples from ancient Europe are equally illuminating. Whatever that be, in Scotland at least the history of land law points to its communal origin, and we cannot ignore the early Scotch "Town-ships," which recognised the common property in the soil and its distribution in certain portions. "In course of time these split up into clans or glen, and the clans doubtless owe to the mountainous nature of the country the distinctive trace of them which still survives."¹ This clan-ownership of land, in course of time, was supplanted by that of the king, so that slowly, by silent operations, feudalism was introduced. "Political necessity early drove the smaller townships in the lowlands to seek the protection of the overshadowing chiefs; the larger burghs soon followed suit, chiefly as a consequence of internal mismanagement; and finally the Highlands also were fain to succumb to the encroaching wave."²

It is not possible to say at what precise time Feudalism found its way into Scotland. The growth
Feudalism in Scotland. here as in England might indeed have been imperceptible. Some believe that the system was known in the days of Malcolm Canmore. The opinion is based on a famous preamble to what is known as Malcolm's laws; but as the authenticity of the laws has been successfully disputed it is of little value. The more likely view seems to be that it crept in after the Norman conquest of England, helped on by the fears and prejudices of man, and aided by the accidental state of the kingdom. It may be that taking advantage of these, the chief of a clan gradually absorbed among his own rights the incidental

¹ Evelyn Cecil, *Primogeniture*, p. 54.

² Evelyn Cecil, *Primogeniture*, p. 54.

Rankine, *Landownership in Scotland*, pp. 460-61.

Dalrymple, *Feudal Property*, p. 24.

claims over the land belonging to the clan advanced by his clansmen, and gradually the patrimony of the clan was converted into the estate of the chief.¹

Whatever be the origin of Feudalism in Scotland it was nursed and regulated in early days by statutes essentially identical with those of England.² The first incident of military tenure had been its inalienability, and it is interesting to notice that even here in Scotland the course of development of the right of alienation was similar to that in England. But a military tenant was soon allowed to dispose of what he had himself acquired provided he did not thereby disinherit his son entirely. The law on this point has already been noticed, and one cannot fail to see that the law was the same in England. The prohibition inserted in the Magna Carta forbidding tenants to dispose of more of their land than would leave them sufficient to perform their military dues was enforced in Scotland by a law of William the Lion, and if it was disregarded the penalty here was forfeiture.³ The counter part of *Quia Emptores*, abolishing sub-infeudations, is to be found in the legislation of Robert I, though the latter could not in practice produce the desired result. The Statute was no doubt passed and was framed in the model of *Quia Emptores*; but the popular mind was not yet prepared to accept it as law, and sub-infeudations were not abolished in practice. The law restricting alienation of military tenures continued in full force and no alienations in military tenures could take place with the consent of the Lord until the tenures were abolished in 1747.⁴ Ingenuity of the people, however, was not idle all this time and it soon succeeded in devising means whereby the tenancies could be alienated, and ultimately eldest sons no longer enjoyed the indestructible

¹ Maine, *Ancient Law*, p. 239.

² Cecil, p. 55.

³ *Statutes, Wilhelm, C.* 31. Cecil, *Primogeniture*, p. 55.

⁴ Stanford, *Entails in Scotland*, p. 37.

right to succeed. The alienation of less than one half of the fee was lawful ; tenants began to utilize this by granting a sub-infeudation of the whole fee to be held of themselves, stipulating at the same time for a yearly fee-duty more than a half of the rent of the lands. No forfeiture would result ; for thus the vassal retained the superiority* of the whole fee and the full rent of a little over half of it.¹

We have seen that in England the law of Primogeniture owed much to the entails for its ascendancy. Scotch Entails. Scotch entails were far more rigid than their English parallels, and here Primogeniture owed much more to these entails than in England. The first undoubted recorded instance of a Scotch entail occurred in the Roxburghe estate in 1648.² The Earl of Roxburghe of the day had some taste for intrigue and autocracy. His sons had pre-deceased him, and failing sons, he desired to resettle his title and estates on whomsoever he should be pleased to nominate. This would mean the effacement of the prior entail, and he could do this only by obtaining a ratification of the new entail by an Act of the Scotch Parliament³ without which it would assuredly have been ineffective. The next landmark occurred in 1662. It had already been the practice to endeavour entails by means of what were known as *irritant* and *resolutive* clauses. If a tenant-in-tail in possession tampered with the right of his successors, an irritant clause in the entailing deed had the effect of declaring his proceedings null and void, while a resolutive clause deprived him of the estate altogether, and handed it over to the next heir in succession. The legality of these despotic entails had always been doubted and they were brought to the test in the year 1662 but came out victorious. Lord Annandale had

¹ Standford, Entails in Scotland, p. 38. Cecil, Primogeniture, p. 56.

² McCulloch, Treat. Succ., 52, cited by Cecil, p. 57.

³ 1648 C. 215 (Scotch Acts).

run into debt ; his creditors had apprised his estates and Lord Stormouth, the next heir, claimed that Lord Annandale had forfeited his rights and that the estate had thereupon become Lord Stormouth's own. The Court was nearly equally divided ; but the majority was in favour of Lord Stormouth's contentions.¹ The result was a momentary victory for strict entails though years afterwards it was thundered out from the Bench that "entails had not a foot to stand upon before the statute of 1685" they being mere creatures of that statute.²

The Statute of 1685 is the most important in the whole history of Scotch Primogeniture. It was modelled on the English Statute de Donis, but was wiser in one respect than its English precursor as it required all entailed lands to be registered at Edinburgh, so that there could scarcely be any secret entail. Its stringency however was appallingly great which indeed accentuated the evils of the system very much and completely overshadowed any good it might contain. "The words of the Statute were too skilful to allow of any trickery such as was devised in England under Edward IV. One or two attempts were made to repeal or modify it. A good deal of discussion was raised, and pamphlets were fulminated upon a project of Lord Kames in 1764 for assmilitating as nearly as might be the Scotch Law of Entail to that of England."³ All these however fell to the ground and matters remained in *statu quo*. But it must be remembered

¹ Viscount Stormouth *vs.* Creditors of the Earl of Annandale (Feb. 26, 1662).

Standford, Entails in Scotland, p. 42.

It was the unanimous opinion of the Court in the case of Agnew of Shenghan that the case of Stormouth was wrongly decided.

² Lord Meadowbank in Hamilton *vs.* MacDowal (March 3, 1815). (Decisions of the Court of Sessions, p. 327.)

Cecil, Primogeniture, p. 58.

³ Cecil, p. 59.

that this Scotch Statute seems to have been passed less in the interests of eldest sons than to secure family estates against forfeiture. Forfeiture for high treason and treasonable agitation was common enough in Scotland in those days. If then any statute exempted entailed estates from forfeiture people would certainly welcome it, and so long as they do not give up all love for political freedom they would be loath to part with it. The attack succeeded only when it was imperceptible ; and the Montgomery Act of 1770 made it possible for the first time to make leases of entailed lands notwithstanding any contrary stipulations in the deeds of entail.¹ The Montgomery Act "authorises the holders of entailed estates, notwithstanding any contrary stipulation in the deeds of entail to grant leases for ninety-nine years of patches of ground not exceeding five acres to one person, for the purpose of building ; it authorises them to grant leases of farms for fourteen years and one existing life, and under certain stipulations for thirty-one years and it gives the heir in possession power to burden the estate to the extent of four years' rent for agricultural improvements, and of two years' rent for the erection of a mansion house, being in all six years' rent provided he contributed toward these objects a fourth part of what is charged upon the estate."² Facility was thus given for limited agricultural improvements and building leases. Apart from this the eldest son's right remained unimpaired, and the popular opinion seems so much to have favoured these entails that though there had been recorded only 79 entails during the twenty years after the passing of the Act of 1685, a century afterwards in 1770 when Adam Smith wrote he estimated that a fifth of the whole of the landed property of Scotland had become subject to the strict entail

¹ 10 Geo. III, c. 51.

McCulloch, *Treat. Succ.*, 66.

Cecil, p. 59.

² McCulloch, *Treat. Succ.*, 66, edited by Cecil, p. 63.

and McCulloch in 1847 fixed the proportion at one-half.¹

But irrevocable imprisonment of land could no longer be tolerated and the Act of 1848, the famous Rutherford Act, was passed. The Act, however, professed not to affect much the entails already in existence. It drew a distinction between entails made before and after August 1 of 1848, the date of the passing of the Act, and if an entail was made on or after the day on which the Act was passed and the heir of entail was also born on or after that date he can, on attaining full capacity and being in possession, disentail the estate in whole or in part under authority from the Court of Session in Edinburgh. But in case of entails made before the passing of the Act, or when the heir of entail was born before that date, there could be no disentailing without the consent of certain of the heirs in remainder or on certain conditions.

This is how the Law of Primogeniture progressed in Scotland. It has been the common law of descent from the earliest times,² and it has been specially fostered by the practice of entails, which have ever exerted an influence in its favour. Attempts have been made to break through this practice, but have succeeded only partially as indicated above.

A different story must be told for Ireland. "There is there
Story in Ireland.
an unhealthy sign of arbitrary action and reaction, too plainly to be accounted for by the high-handed indifference with which England in former times directed her Government. Changes have the taint of legislation *de haut en bas*, of quack appliances by callous conquerors to the conquered; and although the law of intestate succession was ultimately assimilated with perfect equity to that of England, one at least of the previous changes has the sinister stamp of having

¹ McCulloch, Treat. Succ., p. 55.

² Erskine, Inst. Book, III, 8, 6.

been agreed to not for the good of Ireland, but to suit the whim or convenience of the dominant section of her rulers.¹

An interesting link in the historical chain of Primogeniture is supplied by the ancient Irish system of Tanistry. Irish tanistry. Spencer in his "View of the State of Ireland" says, "It is a custom among all the Irish that, presently after the death of any of their chief lords or captains, they do presently assemble themselves to a place generally appointed and known unto them to choose another in his stead, where they do nominate and elect for the most part, not the eldest son, nor any of the children of the lord deceased, but the next to him of blood, that is the eldest and worthiest as commonly the next brother unto him if he have any, or the next cousin, or so forth, as any is elder in that kindred or sect; and then next to him they choose the next of blood to be tanist, who shall next succeed him in the said captaincy if he live thereunto. For when their captain dieth if the seigniory should descend to his child, and he perhaps an infant, another might peradventure step in between, or thrust him out by strong hand, being then unable to defend his right, or to withstand the force of a foreigner, and therefore they do appoint the eldest of the kin to have the seigniory, for that he commonly is a man of stronger years, and better experience to maintain the inheritance and to defend the country."²

As is obvious, tanistry applied only to the chiefship of a tribe, or to the lordship of castles or manors³ and was ever distinct from the peculiar Irish rule of descent in ordinary cases known as Irish Gavelkind which was quite different from the Gavelkind of Kent. At first sight it seems as though tanistry was a partial contradiction of the rule of Primogeniture, that its operation could not be otherwise than antagonistic to it, and

¹ Evelyn Cecil, *Primogeniture*, p. 62.

² Spencer's *View of the State of Ireland*, pp. 5 and 6.

³ Robinson, *Gavelkind*, p. 17.

that it could never become a stepping stone to the modern prominence of eldest sons. A closer examination however would disclose the resemblance. The succession, it would be noticed, devolved always upon a single individual. The tanist was allotted a share of the country as his own, and was entitled to certain 'cuttings and spendings' from the inhabitants under the law by way of earmarking him as the pointed and entailed successor. And like eldest sons in some other primitive communities, he occupied a recognized political rank. So that, though he was not usually the eldest son in fact, he distinctly enjoyed some of the privileges and the position which were sometimes associated with that 'office.' In reality it bore much similarity to the practice of passing over an infant heir in favour of the eldest male of the earlier generation, which, owing to its frequent occurrence among the Celtic clan-associations is known as Celtic Primogeniture.¹

The Irish tanistry and Irish Gavelkind unquestionably represented the general rule, and were the common and remote customs of the country. Occasionally a preference was shown to an eldest son by giving him the house and offices in addition to his share in the divided inheritance under the rule of Gavelkind.² Yet tanistry and Gavelkind continued to be the mainstay of and internal link between each of the tribes. The old customs held their own through the conquest of Henry II and the ordinance levelled at them, promulgated by King John to reduce Ireland under the laws of the conquering country, probably remained almost a dead letter except among the English settlers. The old customs flourished and were respected, unmolested and unchanged for four centuries longer until their death warrant was signed by the English Judges of James I. Gavelkind succumbed first. "It fell in 1606 on account of its inconvenience and unreasonableness, and because a 'meere

¹. Maine, *Anc. Law*, p. 240.

². Hearn, *Aryan Household*, p. 82.

personall custome ' could not have power to alter the common law of England." Two years later tanistry followed, being also 'unreasonable' and 'a great inconvenience' besides being 'void for uncertainty' and a 'personal custom' whose very existence was 'derogatory to the dignity of the common law' and prejudicial to the prerogative of the crown. The judges might well have thought that they were conferring a public boon by substituting the polish of civilisation for the excrescence of barbarian usage; but little did they realize that the very usage they were demolishing had possibly itself formed part of the scaffolding by which their model institution of Primogeniture had been raised.

"Before the close of the Stuart dynasty the lurid glare of internal discord had passed over Ireland; religious fanaticism was rampant; and it was convenient to tamper with the rule of primogeniture in that tyrannical spirit which inevitably characterises the dominion of one hostile religious party over another. "The wind had changed. Primogeniture was not sufficiently subservient to political objects. Kentish Gavelkind, instead, became an instrument of oppression in the hands of Protestants against the Roman Catholics." ¹ Irish Statute was passed in 1703 to prevent the further growth of Popery under the plea that the conversion of Roman Catholic children to Protestantism was often unduly hindered by the fear of disinherison on account of their parents' displeasure. By this statute the estates of Papists were made compulsorily descendable to all their sons, 'share and share alike' *unless the eldest son should be a Protestant* in which case the estate must descend wholly to him as heir-at-law. And lest a Papist son should be bold enough to restore the social importance of the family by buying up his brothers' shares, all papists were disabled by the same Statute from buying any land whatsoever. Law continued in this state till 1777 when it was repealed and the rule of Primogeniture reigned supreme in Ireland as in England.²

¹ Cecil, p. 64.

² Cecil, p. 65.

The Isle of Man imbibed Primogeniture from the example of England. The rights of the eldest son however were looked upon with disfavour as early as 1643, when not only lands descended to him, but it was complained that the whole team of oxen and crop of corn were also decreed by the church in his favour. The Earl of Derby, then the lord of the Isle of Man, therefore ordered that such a decree of the church in favour of the eldest son to the prejudice of the younger ones shall henceforth be void so that the goods would go equally to all the children.¹ From the above it would appear that the Man church of the seventeenth century favoured the extensive privileges of the eldest son, and by the common law of Man an eldest daughter enjoyed a similar privilege in default of brothers.²

The unification of holding or the single succession did not hold ground in Jersey. It has from early times supported a general law very divergent from that of Great Britain; and it is indeed surprising to note that, though a part of the old Dukedom of Normandy, Jersey should be able to point to an original basis of sub-division of inheritance, so little in sympathy with the influence of feudalism. The old law of Jersey gave an eldest son some preference, allotting to him his father's house and garden together with an additional two acres if the estate was in the country. He further took a tenth of the remaining land and so much more as was fair compensation for his liability to pay towards the support of the militia. The remaining land was divided among all the children, the sons receiving twice as much as the daughters. The island was not prosperous and the one cause which the people could discover of this was the excessive sub-division of holdings. The sister islands, where such sub-division was not possible, were much more prosperous

¹ Mils's Stats. Isle of Man, p. 101.

² Contrast Hindu Law : औद्योगिक नानि हि क्षियः.

than Jersey and so in the petition of 1617 it was pointed out that "the infinite partitions do wholly impoverish the people, and leave not men able to find arms or such contribution for defence, or to do His Majesty and the country any good service. And the children of the better sort, depending upon their partitions, give not themselves to trades; an inundation of beggary diveth upon the island."¹ The remedial talisman was the law of entail. The Crown granted the prayer and entails were introduced.²

Before closing this chapter it will not be out of place to give a short sketch of the progress of Primogeniture in the colonies.³ According to Blackstone the law of inheritance is one of the birthrights of the people governed by the English system and even a colonist cannot divest himself of it although he migrates abroad to found a new settlement. The colonists did however succeed in divesting themselves of this birthright and in Canada Primogeniture has practically disappeared. Formerly in Upper Canada the rule of descent was the same as in England; but under the present law all the children inherit in equal shares if their parent is dead. In Lower Canada also equal division is the rule without any distinction of sex or primogeniture. In Nova Scotia and British Columbia also equal division is the rule. By the New Brunswick law the eldest-born received a double portion, the remainder being equally divided. The rule of law in Trinidad is a unique device. Primogeniture is abolished among children, reserving all its energies for co-lateral succession. "And be it enacted," runs the Trinidad Ordinance, "that as amongst the children or rather issue of the purchaser there shall be no right of Primogeniture nor preference of

Primogeniture in
the colonies.

¹ Petition to the Crown, 1617.

Le Quesne, Const. Hist. of Jersey, p. 289.

² Cecil, pp. 67-69.

³ See Cecil, Primogeniture, pp. 69-77.

males to females, but such children and the issue of any deceased for the share or portion of such child shall inherit equally as co-heirs; but as amongst collateral relations the same person shall be heir who in the like case would answer the description of heir according to the law of England, so that males shall be preferred to females, and the elder brother shall inherit to the exclusion of his younger brothers, and the eldest son of the elder brother shall inherit to the exclusion of the brothers of such elder brother."

Primogeniture is generally looked upon as the quintessence of an aristocratic society and it is believed that its disappearance would be another signal for the advance of democracy. In fact however, Primogeniture is in no way inseparably bound up with peculiarly aristocratic institutions. In Australia, for example, primogeniture is the rule; yet no one can say that Australian colonies do not show at least the symptoms of democracy.

But certainly democracy is antagonistic to primogeniture. The laws of the United States would amply illustrate the point. Before the declaration of Independence the English Law of Primogeniture prevailed in several States. But soon the English system melted fast away under the fiery rays of the reforming power. It can hardly be claimed to have left a trace even in the States which continued to allow a double portion to the eldest son. The principle of division has in fact become so much ingrained that a feeling of injustice has grown up throughout the state against a testator who does not devise his property equally among his children. The feeling has grown so rapidly, and the prevailing law of intestate succession has so deeply infused itself into the common form of a will that Beresford Hope was able to tell the House of Commons that no American dared leave his land to his eldest son although there was no law of compulsory division.¹

¹ Hansard, Parl. Deb., 3rd Series, Cl. II, p. 1146.

CHAPTER IV

PRIMOGENITURE IN FRANCE AND GERMANY.

France. France has very often been represented as "having received the mission of revising, from time to time, the great laws of European life and the institutions of Civil and Political right which in the beginning it had helped to establish on every side." If there is any truth in according this traditional mission to France we shall not be altogether disappointed in our search after more light here.

If primogenitary rules have been the subject of much adverse criticism when applied to succession in private estates, they have secured the approval of many when applied to royal successions, and it has almost been assumed that here, at least Primogeniture has always been the rule. But the early period of French history displays a practice which would belie such assumption. Here we meet with a practice of apportioning the kingdom between all the sons of the deceased chief just as a large estate of private property might have been divided. On the death of a king his kingdom is equally inherited by his sons all becoming kings of various districts to which they were either nominated by their father before his death, or which they distributed immediately afterwards by arrangement among themselves.¹

¹ On the death of Clovis in 511, his dominion was quartered between his four sons, according to the Teutonic usage.—Hallam, *Middle Ages*, I. 4.

In 561, on the death of Clotaire, his kingdom was partitioned between his sons. The sons of Charles Martel as well the sons of Pepin

There is indeed considerable irony in beginning a chapter on France with a parenthesis on royal successions. Modern France is as distantly removed from the question as the equator is from the poles. Yet the history of royal succession here reflects a stronger light upon the darkness of the general topic than does that of any other country in Europe, and indeed catches our eyes like a silver star in the shower of a bursting rocket, which adds lustre to the red, blue or green coruscations to float away with it on the consuming breeze.

The Frankish rule of royal succession had practically been hereditary though the nearest heir might not always have a strict right to the throne. If such heir were of full age and in lineal descent, his expectation would almost constitute a moral claim never to be defeated or contested, provided no impediment, such as his minority or weakness of mind, stood in his way. We are not sure whether even in the latter case such deficiencies as are mentioned above would disqualify him as heir: it is often difficult to generalise from particular instances, and it is not always easy to distinguish acts of violence from acts of right. Whatever that be, the mayoralty of the palace was an office distinct from the kingship and had always been elective prior to its fusion with the kingship. Charles Martel, the grandfather of Charlemagne, possessed the rank of mayors of the palace and owed his leadership to one of those periods of dissolution which in all eras have brought opportunity to an intrepid spirit. "His is a good example of that class of anarchical successions when all rules of priority fall into abeyance.

the short (one of whom was Charlemagne) followed the precedent.— Michlet, *History of France*, I, 131, 324. •

Charles Martel himself owed his leadership to one of those periods of dissolution which in all eras have brought opportunity to an intrepid spirit. •

See Evelyn Cecil, *Primogeniture*, p. 81. •

His son, Pepin the Short, so acquitted himself as to be able to oust the then demoralised Merovingians, and obtain the Pope's sanction to his own coronation as king. His accession opens a new period : " henceforth the two offices of kingship and mayoralty emerged in a state of complete fusion and the crown became elective like the old mayoralty. Yet in a way it remained hereditary ; for though it was the people who henceforth chose the sovereign, the choice was always limited to the family. The wills of Charlemagne and his son Louis the Debonair acknowledged and acquiesced in the new arrangement.¹

The death of Charlemagne marks the beginning of another period of the history of royal succession in France. The reign of his degenerate successors let France drift through a period of confusion, tossed in an angry sea like a ship without helm. We have already noticed how the nobles became more independent, and in their hands the elective system gained ground. It was a time of transition and the end would come only with the appearance of the destined leader. This destined leader was Hugh Capet whom the barons chose as their king in 987, and his accession marks the foundation of the Feudal monarchy in France. "It is a great beacon in the history of regal primogeniture. The national individuality which ensued was the basis upon which rested, for many centuries, the unity of the dynasty ; or rather it is probably more correct to say that the unity of the dynasty deriving its strength from primogeniture, was the basis of national individuality and national consolidation." The descendants of Hugh Capet maintained the Crown of France in unbroken male line down to the Revolution and the strict law of succession by Primogeniture was so potent that it overbore the opposition that was manifested against the Huguenot faith of Henry of Navarre. Since the first Revolution the primogenitary rule in French Royal succession has

¹ Cœcil, quoting Montesquieu, *Esp. Lois XXXI, Chaps. 16 17.*
See p 81.

been somewhat tempered by political considerations ; but generally speaking, the rule has now been adopted everywhere in Europe where sovereignty exists with the exception of Turkey.¹

But did Salic law in any way control or influence the primogenitary rules² in royal succession ? In ancient days, in the private property of feuds proper, the very essence of their military nature had originally excluded woman and monks from succeeding to them.³ Later on in private property the spirit of feudal law was overlooked or forgotten, and if a lord could bestow his feud on whichever of his sons he liked there was no reason why he should not be entitled to single out one of his daughters for the purpose. Gradually however the choice was taken away and the eldest son supplanted his younger brothers. Might not the eldest daughter supplant his younger sisters ? This was at any rate the case in England as early as the reign of Henry II, when the principal mansion would go to the eldest daughter in default of sons ;⁴ and in Holland primogeniture presently obtained such universal ascendancy, that in default of sons, the eldest daughter became heiress in preference to all her relations. The analogy between eldest sons and eldest daughters was historically incorrect, but it had triumphed. Might not the triumph extend to royal successions also ? The matter long remained doubtful. The general notion that the Salic law contained prohibitions for women ascending the throne is erroneous.⁴ The prohibition arose thus. We have already noticed how in the early feuds women were excluded

¹ Cecil, pp. 86-87.

² Wright, Tenures, p. 28.

³ With respect to other property all daughters look equally in default of sons, Glanvill, I, *ib.*, VII, 8.

⁴ Maine, Early Laws and Custom, p. 144
Hallam, Middle Ages, I, 46.

from the succession. Hence "in 1328, when the notables were called upon to decide between the rival claims to the French throne, the unbroken continuance of the male line of Hugh Capet misled them into fancying that the rule of excluding women applied to the Crown also. At all events they remembered nothing else, and they therefore adjudged that the crown could not descend to women, nor be claimed through them."¹ The rule being framed there could be no difficulty in inventing reasons for it. The throne of France was so noble, they said, that by no possibility could it go to a woman, nor, therefore, to a woman's eldest son!² The occasion for decision was Edward III's claim to the French Crown through his mother and everyone knows how this led to that desultory war of ambition which lasted nearly a century and a quarter, with the only permanent result that the Salic law was confirmed in a country where it had already been pronounced to be established.

In modern Europe the preponderance of opinion is against the English rule admitting women to the throne. It is beyond our purpose to speculate over the reason for this exclusion of women from the throne. It might have been thought that "feminine rule has a tendency in the long run to diminish some kind of power which may be essential to the dignity of the Crown."³ Or the rule might have originated in the sense of convenience or propriety, disliking to thrust upon a woman certain questions of military or legal administration. Whatever be the reason the fact remains that a majority of European nations have agreed to condemn feminine sovereignty⁴ and that there has

¹ Cecil, p. 88.

² Froissart, Chron. i, l. Ptich, 4.

³ The charge has no basis in fact. Countries like Austria and Russia that have prospered much under the feminine rule have since altered their law of succession to exclude them. (Cecil, p. 89.)

⁴ Women are excluded in Austria-Hungary, in Belgium, in Denmark, Germany, Greece, Italy, Russia and Turkey;—in Russia the

actually been a retrogressive movement in the great empires both of the Catharines and of Maria Theresa.

Leaving alone the question of Royal succession we return to our subject and make an attempt to follow the progress of primogeniture in private succession. "There is a false notion, very commonly entertained, that up to the Revolution the ordinary law of France exclusively countenanced and nurtured primogeniture,"¹ and the misconception is, perhaps, fostered by a vague notion that all egalitarian ideas originated at about that time. The old law of France was however a law of equal or nearly equal division,² and the primogenitary rules owe their origin and growth to military service,³ the idea of a right of primogeniture coming into existence where military service rendered the indivisibility of the fief a necessity.⁴ Brissaud tells us that the right of primogeniture appeared in France with the feudal system. According to him it was established originally in the interest of the Lord. The fief was indivisible because the rendering of feudal services, and especially the military services, would have been affected had there been a partition. The right of primogeniture preceded the heritability of fiefs, for the grantor at the death of the vassal frequently renewed the grant for the benefit of the eldest son of the latter. The fief was granted to the eldest because he had that natural superiority over his brothers which was given by age and experience, because he had been associated with his father—at least, in fact—in the carrying out of the feudal duties longer

exclusive devolution of the Crown through ~~females~~ to males was first introduced by Emperor Paul I, 1796-1801.—Maine, *Early Law and Custom*, 158.

¹ Cecil, p. 91.

² Maine, *Early Hist. Inst.*, 122.

³ One of the appendages of fiefs proper was the condition of military service. •

⁴ Lavelay, *Property*.

than his brothers, and because it was to the interest of the lord to maintain this situation.¹ Fiefs could become hereditary perhaps because transmission by inheritance took place more readily and to the advantage of the lord.² When military service was relaxed or abolished through the weakness of the king, the old law was partially reinstated or at any rate received a reactionary impulse, so that generally younger sons acquired a right to some form of provisions out of the family fief."³ The primogeniture of feudal France was indeed usually qualified by a compulsory charge on the real estate for the maintenance and portions of the daughters and younger sons.⁴ Among the nobles, the eldest son received the preciput or main estate and the younger sons received appanages for which they did homage to their elder brother. In some districts again the youngest son was heir by custom like Borough-English in England where ultimogeniture prevailed. Montesquieu,⁵ writing in 1748, says that he had heard of the prevalence of such a custom in his time in the Duchy of Rohan in Brittany.

But the law had been so clogged and trammelled, and even superseded, by the diversity of local customs introduced by the ascendancy of military service, that half the country remained regulated by the feudal traditions and customs which had set in. North of France chiefly imbued these customs and it accordingly became known as the Pays de droit coutumier. The enormous variety of customs was indeed due to the fact of the independence of the French nobles. It would indeed be a mere repetition to recapitulate again the steps of imperial disintegration which Charles the Bald and his predecessors

¹ Continental Legal History Series, History of French Private Law pp. 635-636.

² *Ibid.*, p. 636.

³ Cecil, p. 92.

⁴ Kenny, Essay on Primogeniture, 70.

⁵ Esp. Lois, XVIII, 21.

allowed themselves to tread. Suffice it to recall that, after the manner of unwitting advocates of disintegration, they made concession after concession, until their nobles became kinglets and it was no slow transition by which the lustre of the Crown of Charlemagne was reflected and partitioned among these self-constituted suzerains.

Many of the customs in a greater or less degree favoured primogeniture, specially those of Paris, Normandy, Picardy, and Orleans, and even divine right was put forward as an argument for its maintenance.

In the south of France, the pays de droit e'crit, where the influence of Roman law of equal division was strong and feudalism had made less way, the privilege of eldest sons had a harder task to establish itself. Yet it succeeded in its onslaught even on this part of the country and the tactics it adopted were both ingenious and successful. The Roman law had always allowed certain privileged mode of disposition of property to the soldiers on active service. These soldiers were allowed to leave their property just as they pleased, to whom-so-ever they liked, without any restrictions. They were not compelled to make an equal division or any division of their property. What Roman law allowed for the soldiers on active service had only to be extended to the knights, chieftains and feudal lords, who were looked upon as the ornament and bulwark of the social organisations of Languedoc, and this was done in interpreting 'soldiers on active service' to include these worthies. "The plan would not infringe the prejudices of Roman law; neither would it interfere with peasant customs. At the same time the feudal chiefs would be at liberty to leave their estates to their eldest sons, thus not only concentrating their own power but gratifying the posthumous vanity of founding a family." The contrivance succeeded fully; and "though primogeniture was never the general law of France even at the outbreak of the Revolution, it obtained a footing in the north and south through different channels to such advantage that it

was able to retain a firm hold upon the feudal tenures of the country up to the days of Louis XIV." Only the 'roturier,' the non-noble tenures, remained as a general rule, untouched by it.¹

We have noticed above one influence of Roman law on the development of primogenitary rules. There has yet been another and perhaps a greater influence exerted by Roman law in popularising primogeniture in France.² Roman law indeed may fairly be considered the original source of French entails or 'substitutions.' The Roman *substitutio vulgaris* was that by which a testator after having instituted an heir, nominated a second or substituted heir in case the first should, for any reason, decline to accept the inheritance. The French derivative of this substitution no doubt wore a very different complexion; yet both are marked by the greatest similarity in features. A detailed explanation of French substitutions would be beyond our purpose. The history of entails has more or less the same characteristics in every country, and it is indeed curious to note how similar their development has everywhere been, notwithstanding the varying conditions affecting them. Wherever entails have existed, they have always tended to perpetuity at some stage or other, and perpetuities have invariably been the curse of the system. "In France, after they have grown up and increased in strength for a century or two, they followed the conventional course, and it became a matter of public policy to curtail their unlimited extension. The question was taken in hand by the famous Chancellor De l'Hôpital," and he forbade substitutions beyond two degrees or generations from the entail.³ This prohibition was confirmed and set on an im-

¹ Cecil, pp. 93-94.

² See Continental Legal Hist. Series, History of French Private Law, p. 726.

³ Notwithstanding this 'Ordinance' of 1560, the custom of substitutions without limitation seems to have continued in the four provinces of Flanders, Aston, Franche-comte and Roussillon. (See Cecil, p. 95.)

proved footing by subsequent Ordinances, and it continued until the Degrees of the National Convention in 1792 pronounced the death sentence of all forms of substitutions and all customs of primogeniture. This degree was passed in all haste and was indeed peremptory. Yet the old adage "more haste less speed" did apply to this occasion and the Code Napoleon, though still professing to maintain the abolition of substitutions, was compelled to re-introduce them, though within very prescribed bounds.¹

It was the misfortune of the primogeniture to have associated itself with anything feudal and it was this misfortune rather than its fault which brought it within the reach of the political guillotine of the Revolution. The right to receive feudal dues and enforce petty monopolies was what was much resented. "The sense of property was in the people, and they looked upon feudal dues as a cumbersome tax upon land which they felt to be their own." "The encumbrance did not coincide with the new-fangled notions of liberty and equality," and the first blow they struck was on August 4, 1789, when the National Assembly entirely abolished the Feudal regime; it was followed by a series of others. With it collapsed the system which had really given French primogeniture birth, and which by lapse of time had grown too putrid to support it. The blow went further and the climax was reached when in the shape of a law with a retro-active clause they purported to re-open the whole question of all successions which had already been administered and distributed with the professed aim of ensuring the absolute equality of all heirs.²

When the frenzy was over and equilibrium was restored, the phase of reconstruction came and men were at pains to

¹ Code Nap., Arts. 896, 897 and 1048. (See Cecil, p. 95.)

² Dolloz, Rep., Vol. XII, p. 148.

This law was passed on the 17th Nivôse year 2. (Jan. 7, 1794). Cecil, p. 97.

mould into shape the wild revolutionary extravagances which survived. Egalitarian principles remained ; but they were to be stamped with the dies of justice, practicability, and ancient custom, so that a result of permanent value might be obtained. The jurists to whom the duty was entrusted accomplished their object with admirable skill, and they built up the monumental edifice, the Code Napoleon. By Article 745 of the Code, the equal distribution of the estate of a deceased man among his children without distinction of age or sex is provided for. By Articles 913 and 919 however he is given the option of leaving away a fraction of his property if he so desires out of which he can at his option slightly increase the share of any child, the excess over the legal share being styled the *preciput*. All the children are however always sure of each getting a portion, a certain fixed proportionate slice or *legitim*, partitioned between them if they so choose. The French law of succession limits the parental power of testamentary disposition over property to a part equal to one child's share and leaves the remainder for the children for equal division among them.

Our tale of primogeniture is told for France. Yet before leaving the subject we must say a word about
 French Majorats. the peculiar French entails in perpetuity, called Majorats,¹ which are applicable only to estates of hereditary nobility. No doubt after the Revolution no such new entails can be created ; yet their history, old as it must be, deserves a passing consideration. Without probing the depth of antiquity to ascertain the precise birth-date of majorats, suffice it to say that these existed in France in unmolested efficacy up to the middle of the sixteenth century. The Ordinance of the Chancellor de l'Hôpital somewhat checked their career by curtailing their unlimited length, though they still contrived to find a refuge from its attacks in four of the French provinces,

¹ See Continental Legal History Series, History of French Private Law, p. 727.

until suppressed at the Revolution. The curious part of their history really begins at this point. Doomed to death by the revolutionary principles they very soon found a refuge in the ambition of Napoleon who after the reign of terror was endeavouring to play as high a stake as he dared for the whole power of royalty without exciting universal distrust and repugnance by adopting it in name.¹ His chancellor characterised noblesse as one of the essential vanities which must surround any stable throne. Napoleon wanted to restore that galaxy of noblesse; but the problem was not so easy in the midst of the prevailing theories of Revolutionary equality. He dared not attempt it in the French soil. An opportunity however soon arose when he made conquests in Austria and Italy. He granted them out as fiefs on condition that their tenure should devolve in strict entail male, in the line of primogeniture, with a reversion on failure of issue to the French Crown. No one did make comments, for the soil was not in France. Further opportunity soon arose for its extension when a princelet, who owned the principality of Guastalla near Modena thought fit to sell his domain which was entailed as a majorat, to the Napoleonic Kingdom of conquered Italy, and Napoleon immediately declared that the price to be paid to the prince should be in the form of equivalent possessions under the jurisdiction of France, to be held in entail under exactly the same limitations as he held his former principality. Entails thus appeared upon French territory without the least suspicion of the people. To ensure his object the Emperor at the same time slipped in for himself a general power to establish similar entailed estates "either as a reward for meritorious services, or to excite useful emulation, or to reflect the resplendence of the throne." This stratagem was speedily followed up by other decrees, which were heralded by the creation of a new hereditary nobility with titles transmissible

¹ When he did adopt it, he still cautiously shrank from the full exercise of its authority. Cecil, p. 107.

to eldest sons ; and the express condition upon which a hereditary title was granted, was that its recipient had first established a majorat in favour of his eldest son and successor. All these were done by the decree dated 1st March, 1808, and this decree divided majorats into 'majorats de propre mouvement' and 'majorats sur demande,' the first owing its origin to a grant of the Emperor while the other was the creation of private initiative.

The period from the Restoration in 1815 to the Revolution of 1830 marks the golden age of majorats. So keen was the spirit of the Restoration that an Ordinance of 1817 required that no one should be summoned to the Chamber of Peers who had not entailed his estates after this manner.¹ These fifteen years of gold were busy legislating for majorats and the effect of these legislations was so thorough that at the outbreak of the Revolution of 1830, four hundred and fifty entails of nobility had actually been created since the decree of 1808. A law of December, 1831, in abolishing hereditary peerages, rendered the existence of majorats pretty well pointless till in the third Revolution they were definitely abolished.²

Allen tells us that before the Teutonic tribes quitted their original settlements, territory was held among them as the common property of the tribe or kindred.³ "The territory was divided into canons, and subdivided into townships. Plots and portions of land were granted to families and individuals, and resumed again by the tribe and redistributed among the families after a certain period. Sometimes these redistributions were made annually⁴ ; and in a state of society where warfare and hunting were almost the very conditions of existence, and agriculture and stationary industries

¹ An exception was made in favour of the clergy.

² Cecil, p. 109.

³ Royal Prerog., 229, 201. See Cecil, p. 112.

⁴ Caesar De Bell Gall., IV, 1: VI, 22.

were either unknown or ignored, the frequency of redistributions would not have been felt as a clog upon progress."

It is beyond our purpose to give a detailed discussion of the land system prevailing in any community. We cannot yet avoid the digression here, for otherwise we shall miss the germ out of which the Teutonic community has evolved, and would fail to bring forth the identity of this germ in its rudimental construction with that of every other. Once we succeed in establishing this identity it will not be very difficult to see if the laws of a similar growth are contained within it. "The history of this growth is recorded in the history of the occupation of land; for, in contradistinction to the citizens of the antique world, the Teutonic race is essentially a race of Land-Folk."¹

"The original Teutonic community is an association of freemen, a 'Gemeinde,' a commonalty or commons amongst whom the private right of property in land is correlative to the public duty of military service and participation in the legislative and other political acts of the community." Certain geographical area is marked out and appropriated by the community and is known as a mark consisting of three distinct parts. The first is owned jointly by the community and is known as the common mark. The second is cut out of this common mark and is apportioned in equal lots to the members of the community. This is the Arable Mark, the Feldmark, wherein the individual marksman has a distinct inheritance and a sort of individual ownership. The third, the Mark of the Township, is also individually appropriated, being divided into equal lots. There is thus this three-fold relation of an individual to the land occupied by the Gemeinde. "He is a joint-proprietor of the common land; he is an allottee in the arable mark, and he is a house-holder in the township."² In his first capacity he owns

¹ Cobden Club Essay, System of Land Tenures, Agrarian Legislation of Prussia, etc., p. 279.

² The Agrarian Legislation, etc., p. 280.

"de indiviso," and his rights are strictly controlled by those of his co-marksman.¹ In the second, he can call a certain limited area his own but he must cultivate his lot in concert with his associates and the community at large determines the mode of its cultivation. In the common mark as well as in the arable mark there is everywhere that communal control, and the individual cannot disobey the minute customs and usages of the community. "He is contained by and tethered to the association."²

In his dwelling house and its appurtenances in the township, however, the individual is the absolute lord and master, and this is in the fullest sense his own (Eigen). Over his family, over the dependents and slaves, he is the absolute lord; to them he is the law-giver, the law-enforcer. Here neither public nor communal officer can enter otherwise than with his sanction. It lies outside the community and constitutes an "immunity."

The most important feature of the early Teutonic community is this dual capacity given to an individual, he being both a lord and a commoner, lord when within the pale of his homestead, and a commoner, when standing outside that pale in the economy of the mark. Herein are reflected the two salient characteristics of the Teutonic race, its spirit of individuality and its spirit of association.

Here we shall note a strange peculiarity of the early Teutonic land system. The personal status of the occupant seems to adhere to his belongings and if the "occupier privileges the manor occupied by him, the manor thus privileged invests the later occupier with those privileges."³

We have ~~given~~ an account of the First period of the

¹ His cattle grazes on the common pasture under the charge of the common herdsman; he has wood in the forest under the control of a communal officer.

² The Agrarian Legislation, etc.....p. 281.

³ The Agrarian Legislation, etc., p. 282.

Teutonic community and must notice here that during this period there seems to have been a general rule that children succeed to their fathers in equal shares. Nay, not only this, the lands are still used to be distributed in periodic allotments by the public authority¹ and even in the days of Tacitus every township received an allotment in proportion to its population which was divided among families, by choice, according to rank. Owing to the advance of agriculture, redistribution was gradually restricted till it ceased.

The rule of equal division amongst all the children found a remarkable exception among the Tencteri
Early rule of equal division. who fully accepted a principle of primogeniture except in dealing with the special important possession, for which particular aptitude was required. These people were a warlike tribe, taking special delight in cavalry exercise. With a people like this it is but natural that the war horse would be regarded and honoured as a special object of inheritance, a kind of jewelled heir-loom in the family property and while everything else went to the eldest son who, with this people, was the general heir, the prized horse was reserved for the son who was bravest and most redoubtable in horse-management.²

This is what we learn from Tacitus. But it scarcely justifies the inference drawn therefrom by Prof. Hearn who says from this that in ancient times the heir among the Teutons generally was the eldest son. Tacitus however refers only to the Tencteri and the passage cannot bear so wide a construction.³

¹ Tacitus, Germ., C. 26.

² Tacitus, Germ., C. 32.

³ In the article in Encyclopædia Britannica, 29th Edition (Primogeniture) this passage has been wrongly taken in asserting that it was the eldest son who took the war horse as heir-loom. The descent of the remaining property is not noticed at all.

Property in land in early Teutonic ages seems, as a rule, to have been divisible among the heirs of a deceased owner though not usually divided actually. There seems to have been a tendency to keep the land of the tribe or family together, although the laws of the Germanic barbarians contain no general mention of any custom of primogeniture. Huebner assures us¹ that "succession by one heir among several of the same degree was unknown to the Germanic law, and equally under the German law the heritage passed to the co-heirs ("Ganerben") collectively; they were regarded as the successors of the decedent by collective right, to the same extent as a single heir. The apportionable rights and obligations included in the heritage also passed to the co-heirs without division."

This early period of the Teutonic community, which is often named as the period of 'landownership' and 'equal possession,' was followed by a period which may be characterized as that of land tenure, and of unequal possession. The transition from the one state to the other is necessarily influenced by a great variety of circumstances. But it will be beyond our purpose to start an enquiry into these various circumstances. Suffice it would to say that in course of time various forms of tenure arose among the victorious Goths and these were interspersed by a diversity of local usages of which we should notice here '*geschlossene Güter*.' This "*Geschlossene Güter*" gradually grew up among the German agricultural populations and spread through every country where German influence reigned. It meant estates which were inherited undivided, and administered by a single heir for all the heirs. At a later period the term has been also used to denote compact estates, not broken into, or separated, by strips of land belonging to the neighbouring town or village. These were thus

¹ Continental Legal History Series, History of German Private Law, p. 708. See also p. 763.

impartible and as such became one of the corner stones upon which primogeniture was able to build. Rights and customs stood out in great variety in different localities.

Before proceeding further we should notice certain features connected with the transition from the first period to the second. The first would be the "intertribal ways, the consequent subjugation of other communities, the appropriation of the land in the common marks of these communities, the unequal division of the lands so appropriated according to the amount of fighting work done by the associates."¹ These are the earliest and most effective causes that broke up the original equality of property and lead to the accumulation of wealth in a few hands. The second is the cessation of the political independence of the individual community without any cessation of the political functions of the members.² The several communities retain in their own hands the management of the affairs of their own township, but national affairs are transacted in general assemblies. The third feature is the separation between executive and legislative functions, the establishment of permanent executive organs, and the gradual hereditariness of the executive office. Hitherto the assembly of the community has been all in all. A chief—a king, a Herzog,—was to be elected only in case of war and this was done by the assembly. The purpose was purely military and he ceased to exist as soon as war was concluded. As a court also the assembly had to elect its president and the election

¹ System of Land Tenure, p. 283.

² *Ibid.*, p. 283. This process takes place in two ways, first by the gradual colonization of the Common Mark by communities sent forth from the original townships in which case each new township receives an Arable Mark cut out from the Common Mark, but the common mark itself continues to be owned 'de indiviso' by all the township; secondly, by the agglomeration of a number of marks into a loose kind of confederacy, which, by degrees, assumes a greater consistency, and becomes in time a national duty.

was temporary for each case. From the earliest times, however, in both cases, choice appears to have been limited to a certain number of families, who, in some special manner represented the blood of the tribe, and little by little, though in form still elective, the office becomes practically hereditary. This indeed is the universal tendency throughout the Teutonic Kosmos, and applies to all its institutions. The king of the nation though '*de jure*' elective is '*de facto*' hereditary: so also is the Judge of Schultheiss, the president of the Court of the township. Here indeed lies the germ of the manorial rights which afterwards became the key-stone of the entire land system in Feudal-times. The office was indeed identified with one particular manor in each township, so that whosoever owns the manor exercises the office and whosoever exercises the office owns the manor. In every Teutonic township one manor (Hof) thus becomes *par excellence* the manor and is variously described as the 'Salhof, Frohuhof, curtis dominicalis, curtis judiciales.' It gradually receives dues and services from the other manors in the township.

The pure Teutonic soil was thus not uncongenial, to the growth of Feudalism,¹ and from what we have said already it would appear that there were those predisposing causes in the pure Teutonic Society which led, when that society came to conquer the Roman world, to the establishment of the Feudal system,—a system made up of Teutonic and Roman elements; we find in it the Teutonic idea of the correlation between possession of land and military service, and Teutonic tendency to change public office ~~into~~ private right, and the transmission of such right by inheritance. On the other hand there are the Roman ideas regarding 'beneficial uses,' difference between 'possession' and 'dominium' as well as the Roman

Feudalism in Ger-
many.

¹ See Continental Legal History Series, History of German Private Law (Huebner), pp. 334-349.

practice connected with the agricultural colonisation of the provinces.

We are speaking of Feudalism because almost everywhere in Europe Feudalism influenced much the fate of primogeniture. Here in Germany the divisibility of an inheritance long subsisted in property regulated by the old customs of *land-recht*, and, as has been noticed already, the usual practice being no division though divisible, a representative member of the family was only chosen as a general manager or guardian for his relations.¹ In property affected by the Feudal influence of *Lehnrecht* however traces of primogeniture became very perceptible and hence we cannot do without reviewing the development and growth of Feudalism in Germany.

The application of the Feudal system in Germany was however a much slower process than in the Roman provinces, where it was, as it were, called into life by the exigencies of conquest. In Germany it was an economical necessity rather than a political convulsion which brought about the change. "As population increased more and more townships were settled on the common lands, the proportion between pastoral as compared with agricultural wealth decreased; and the ordinary freeman was gradually reduced to little more than what his lot in the arable mark brought him in. We are not much interested in the steps by which the free-owner was little by little reduced to the condition of an unfree holder partly by his poverty, partly by the pressure, often amounting to force, brought to bear upon him by the lords who wished to increase their demesne lands. The free owners under pressure of poverty and force very frequently took to *commendatio*, surrendering the 'dominium directum' of his 'allodium' and receiving back only its 'dominium' title, thus losing his personal rights in order to gain in return protection against oppression.

¹ Robertson, *Historical Essays* (Edinburgh, 1872), p. 153.
Cecil, *Primogeniture*, p. 114.

He thus gradually ceased as owner and turned into holder of mere tenure and had to render military service to his superior.

This is how Feudalism developed and in its wake came primogeniture. The empire of Charlemagne was dwindling away; and the deposition of Charles the Fat in 888, eleven years after the death of Charles the Bald, marks the final rupture of the connection between France and Germany.¹ The custom of primogeniture subsequently advanced for a period by leaps and bounds. "The fluctuating line, which divided the right to dispose of property to one single successor from a single successor's hereditary right to succeed, became ever less and less well-defined."² There was a practice of making family compacts (*Hans-Gesetze*) which stipulated that lands held by military service would descend to the eldest son,³ and this practice much helped the growth of primogeniture. Its diffusion was helped by the Feudal atmosphere where it was much valued as an instrument for avoiding a fatal crumbling up of the fief. It was invoked by the very weakness of some of the imperial rulers; and each cause stimulated the other. The skill and firmness of some of the early Emperors of Germany momentarily checked its progress, but it required far more than a few spasmodic efforts to produce any permanent effect, and it may be that amid the pressure of a Feudal organisation, even the best strategy would have been faultless.

The original idea was that the tenant of a fief was the holder of an office, and on his death the office was vacated and did not necessarily descend in his family. Custom and the interest of the nobles exercised their joint influence in favour of hereditary tenure, and as has already been noticed, the Teutonic inclination was not opposed to this hereditariness of offices. Conrad II, in 1037 A.D., issued an edict applicable

¹ Hallams, *Middle Ages*, ii. 66.

² Cecil, *Primogeniture*, p. 115.

³ Maine, *Anc. Law*, 232.

to smaller fiefs whereby he made these fiefs hereditary with the object of rendering the mediate nobles, the holders of these smaller fiefs, more independent of the great lords. "Yet even after this innovation the presumption still was that a fief was not hereditary unless the charter granting it expressly declared it to be so; and grants of fiefs for life only still did not become uncommon."¹ The nobles strenuously tried to remove the official character of their tenure and make it hereditary. In 1158 the Emperor Frederick Barbarossa was constrained to issue the important constitution already referred to which he was led more by force of circumstances than by any judgment of his own, and by which was ordained that all honorary fiefs or feuds should be indivisible.² At the same time they became hereditary. The lesser military fiefs soon aspired to follow this precedent of dignity and this materially forwarded the cause of primogeniture. It affected the whole length and breadth of the Holy Roman Empire. Nearly a century later in 1232 the Emperor Frederick II by a constitution admitted, what had already been the fact, that the Feudal princes were the real lords of the soil, and not merely tenants in virtue of an official character. Indivisibility and individual succession thus became a fully recognised principle in the German principalities in the thirteenth century.³

Individual succession however did not necessarily mean primogeniture. Sometimes the father named his successor from among his children;⁴ in some German estates the subjects had a right of choice; and Waldeck distinguished itself by achivalrous method of its own. In 1271 the succession opened and there were three brothers one of whom only must succeed.

¹ Cecil, p. 116.

² Libri Feudorum, Bk. II, lit. 55, Sect. 4. "Praeterea ducatus, Marchia Commitatus decactere non dividatur."

³ Cecil, p. 117.

⁴ This was so in Flanders.

They discarded the unromantic rule of primogeniture and being best of friends preferred to agree that whichever of them would be fortunate enough to win the fair hand of the daughter of the Landgrave of Hesse should also become the ruling Count of Waldeck! The youngest brother was the lucky man and so he became the Count.

So though the rule was individual succession, all sons were equally eligible for it. But the invidiousness of the proceeding of choosing which son should inherit soon led to a fixed rule in favour of the eldest son, or, in a few cases, of the eldest relation. The younger sons do not at first seem to have been provided for in any special way. "Later however, particular lands were sometimes set apart out of which provision could be made for them, something probably in the nature of modern dower-lands."¹

We have seen above that when inheritance was divisible it was scarcely divided. Now that it has been made indivisible a strange reaction set in and suddenly the holders felt the necessity of division. This most remarkable change came over the development of primogeniture in German principalities and it is this that completely severs the history of primogeniture in Germany from the history of its progress in every other Feudal country. There was a sharp reaction in Germany in favour of division of inheritance among all the sons, which resulted in making divisibility the general rule and supplied the cause of that interminable number of smaller States which were the persistent obstacle to a powerful and united empire.

The constitution of Frederick II, we have seen, acknowledged the feudal princes as lords of the soil. Thus becoming absolute princes they soon thought of increasing their independence and would not submit to any rule of indivisibility. "They soon proceeded to exercise their authority and display their

¹ Evelyn Cecil, *Primogeniture*, p. 118.

magnificence by assuming a right to divide their principalities upon their deaths among their sons. The new school of Romanist Jurists who likened the princes' lands to a Roman *hereditas* encouraged this practice, and the Emperors had neither the power nor inclination to prevent them. These Emperors themselves were anxious to divide their possessions among their sons and it was necessary for them to have support of the princes at any price to further their designs against the Popes. Besides any shrewd emperor was only too willing to favour a system which by splitting up the principalities was sure to weaken the individual power of each owner. Sub-division thus became the practice and policy of the day. It was the desire and the pride of the princes; it was the wish and policy of the Emperors.¹ In some cases the first step was to make these great Feudal principalities huge joint-tenancies in the hands of brothers or collaterals. Then, from being joint-tenancies in fact, these became merely joint-tenancies in name, and in nearly all the German princely houses a passionate eagerness for the partition system of inheritance set in so as to leave its mark in the intricacies of German geography, even at the present day.²

It is not difficult to imagine into what an abyss of confusion and helplessness the whole of the great German-speaking nation was being speedily hurled. The constant sub-division caused a

¹ So early as 1242 the two Dukes of Brunswick, Albert and John, divided Brunswick between them into Brunswick and Lunburgh with the consent of the Emperor.

In 1281 the Emperor Rudolph I went so far as to grant the duchy of Bavaria to Duke Ludwig on the express condition that at his death it should be divided equally among his sons. (See Cecil, *Primogeniture*, p. 120.)

² The splitting up process took place mainly between the 13th and the 16th centuries. As generations multiplied, Saxony was split up into Saxe-Waimar, Saxe-Eisenach, Saxe-Gotha, Saxe-Meiningar, Saxe-Coburg, Saxe-Romhild, Saxe-Eisenburg, Saxe-Saalfeld, Saxe-Hildburghausen, etc., etc., etc. Bavaria was divided into the

hopeless disruption of the principalities and quarrels early broke out upon the question as to who had the right to elect the emperors. "The privilege was a badge of power, enjoyed by those electors whose local omnipotence history has recorded." They might divide their lands but certainly not their votes ; and surely the division should not have the effect of multiplying the votes. This gave rise to a dispute as to which of the heirs was to be the possessor of the prized privilege. The quarrels not only disturbed the peace of the individual states, but seriously endangered the peace of the Empire. So Charles IV set about dealing with this difficulty by the issue of what is known as the Golden Bull in 1356. He reduced the number of electors to seven and restricted the privilege to the Archbishops of Mainz, Cologne, and Treves, the King of Bohemia, the Elector Palatine, the Duke of Saxony and Margrave of Brandenburg. It was also decreed that the electoral lands were indivisible.¹ This decree of indivisibility for the electoral lands acted as a note of warning and indivisibility was introduced in certain non-electoral lands also. But any rapid change was not possible. Princes were striving towards it and the steps taken were gradual and cautious. Sometimes the two eldest sons were left the inheritance to the exclusion of others. Sometimes a common inheritance between the sons and cousins was attempted. "Sometimes the practice was to leave the eldest son to direct matters in the name of his brothers ; and then the younger sons would sometimes be sent into the Church where they could have no legitimate descendants, and if lucky enough, had the

Munich division, the Ingolstaad division, the Lanshut division, the Palatinate division ; the Palatinate was again divided into the Electoral division or Lower Palatinate, the Upper Palatinate, the Simmern Palatinate, and the Mosbach Palatinate, etc., etc. For an interesting record of these genealogies, see Schulze, *Recht der Erstg.* pp. 251-309. (Cecil, p. 120.)

¹ Cecil, p. 123.

prospect of excelling the grandeur of their elder brother by attaining a bishop's Crozier, or even an elector's ermine. But this gradual re-introduction of primogeniture encountered considerable opposition and even arguments from religion were called in to assist the opposition."

At last however the splendour of Louis XIV accomplished the task which the strenuous internal efforts failed to do. During the thirty years' war (1618-1648) the German Princes came in close contact with the court of the French monarch and "the display of the external radiancy to which a system of primogeniture would conduce" captured their fascination and "all the German princelets promptly fancied themselves also to be the personification of their states, and built their Versailles." They introduced the rule of primogeniture to ensure the splendour of their house. The smaller nobles proceeded to imitate them and *fideicommissa* came to their assistance. Every one felt that the public safety was wrapped up in the consolidating idea of primogeniture, and religion was now invoked for the opposite purpose, and references were made to the recommendations of primogeniture in the Pentateuch.

Legal precedents, however, seemed to stand in the way and it was a hard task to get over this difficulty. "But it will be an evil day for the public when the ingenuity of lawyers is unable to supply the oil for working the machine of State laws," and the ingenuity of the seventeenth century lawyers, was in no way less than that of the present day. Some well-read lawyer unearthed the work of one Andreas Tiraquellus, a French politician, who had published an extensive treatise on the subject. "This learned enthusiast had set himself to prove the existence of more or less matured primogeniture among the ancient Egyptians and Moabites, the Persian Chieftains, Greeks and Athenians." He established that it was recognized even among the Romans. Its recognition was found in Africa, Tunis and Fez. So it was shown to have been a world-wide rule. In the face of such a mine of research as this, the solid

precedence of the 118th Novel of Justinian could have no bearing upon the case of German principalities.

This is how primogeniture has obtained its footing in the Principalities. "The custom of charging the income of the eldest son of a Prince with the payment of quota for the younger children only grew up recently. Undiluted primogeniture in the modern sense, securing an exclusive prerogative to the eldest line was gradually introduced in the more recent family compacts and it may roughly be laid down that its universal applicability in all the German princely houses, now acknowledged, is an out-growth of the last three centuries.¹

But did the rule apply to private properties? Before proceeding to answer the question it must be noticed here that the rule did not apply to the private property of German princes. These private properties were always kept distinct from the Crown and if intended to go with the latter there must be separate settlement or devise. Otherwise ordinary intestate law would apply. An early link in the historical chain may be found in the *Stammgüter*, or hereditary estates, of the nobility of the middle ages descending to a single heir, usually to the eldest son. In the middle ages these estates flourished in certain special provinces and their particular characteristic was that they traced their source and rule of descent to custom. In order that this custom of descent may be applicable the estate must have been an ancestral one; any land that the possessor himself acquired was no part of the *Stammgut*. By the old local laws the male sex was preferred to the female; but, failing sons, daughters were not excluded. Later on however, they could not descend to daughters, the exclusion being the result of the requirements of Feudalism. Inalienability was

Primogeniture in
private properties.

¹ Cecil, *Primogeniture*, p. 127.

not an essential feature of such estates ; the consent of parties interested was required for their sale.

But at the present day very little is heard of *Stammgüter* ; these have been merged in an institution which has eclipsed them altogether and in place of descent regulated by ancient custom we have descent governed by special private wish. The system of *fideicommissa* now occupies the field and is much favoured perhaps because in it people's vanity finds wider scope of satisfaction. According to the whim of the founder, property subject to a *fideicommissa* might descend as a *majorat* in a line of eldest sons or as a *minorat*, in a line of the youngest. *Fideicommissa* might also provide for *seniorat* or *juniorat* ; but as a matter of fact property almost always was settled to descend in the order of primogeniture.

The career of German *Fideicommissa* was quite distinct from that of Feudalism. The Roman institutions might have supplied at least the suggestion and probably these were not very remotely connected with early *Ganerbschaften*.¹ The spirit of emulation however seems to be mainly responsible for their invention. The lesser nobility always coveted much the family resplendence of the princes and they bethought themselves of this means of emulating and reflecting their family grandeur. The early German law supplied the material and it had only to be engrafted upon the Roman law.

But the progress was not without opposition. We have seen how Code Napoleon abolished *fideicommissa* in France ; and we must be prepared to see the same effect of the code in Napoleonic Germany. Three or four years after the promulgation of the Code in France, it began to be proclaimed in various states of Germany,² and with it the edifice of

¹ Family associations where a number of families held property in common, under a common administration or trust.

² The Code was introduced into Westphalia in 1807, into Wurtemberg and Bavaria in 1808, into Baden in 1809, into the Grand

fideicommissa fell to the ground. With the ebb-tide of French domination however Fideicommissa reappeared.¹

It will serve no useful purpose to give in details the career of Fideicommissa in Germany. Suffice it would to notice that in many states, in order to prevent the abnormal growth of these Fideicommissa, the consent of the ruling sovereign or a legal sanction became necessary for their creation and in some of the states none but the persons of the rank of nobility (Adel) had the right to create it.² What is specially of interest for our purpose is that in some of the states³ it is an absolutely essential condition of the creation of a Fideicommissum that it should embody the principle of primogeniture. Originally inalienability was an essential feature of a Fideicommissum. The tendency of modern legislation however is to enable the unanimous consent of a full family meeting to effect a sale or mortgage of the estate or to break off the entail.

We have noticed above how Fideicommissum tended to remain confined in noble families. An attempt has later on been made to introduce these Fideicommissa among peasant properties, the entailed farms thus created being named *Erbgüter*. The attempt however does not seem to have met with much success⁴—the settled estates failing to provoke any enthusiastic welcome among the German peasantry.

The German peasantry did not welcome Fideicommissa and so the peasant properties would be subject to perpetual morcellement. For in Germany the ordinary law of intestate

Duchy of Frankfort on Maine in 1810, into the Hanseatic towns in 1811.

¹ The first sign of them was visible in the Bundesacte in 1815 within a few years they were re-instated in Bavaria, Wurtemberg, Westphalia and other states.

See also E. Cecil, *Primogeniture*, p. 131.

² Bavaria may be taken as an example.

³ *E.g.* Bavaria, Hanover, Brunswick. (Cecil, p. 133.)

⁴ Cecil, *Primogeniture*, p. 136.

succession is that the whole of the deceased's property shall be equally divided among his widow and children. Even in case of testacy he is obliged to leave every child a fixed fraction of what the child would have received had the testator died intestate. This is what is known as *Pflichttheil* and it closely resembles the *légitime* of France. The inclination of the people is already against such possibility of morcellement, and since the year 1870 attempts have been made in many states to remove the restrictions on the power of disposition by will as well as to give the option of creating *Anerbenrecht* which is only a diluted form of primogeniture. The laws establishing *Anerbenrecht* only enact that a child or heir (*Anerbe*) is to take a special share in excess of that of others.¹

When people feel the need of a remedy it would sometimes develop as an offshoot of some half-forgotten stem. Something indeed of this evolution can be traced in the development of *Anerbenrecht*. In the middle ages among the villein tenants another form of *Anerbenrecht* was in existence. "In the sixteenth century this form began to be extended by the princes and ruling lords to their free tenants in order to prevent the splitting up of their tenants' estates so as to ensure their requisite contributions to the princes. At this period the princes would decide who was to be the *Anerbe*. This old *Anerbenrecht* however was pretty nearly obsolete at the beginning of the 19th century when the need of the people revived and remoulded it, giving it a new stamp to meet changing theories and conditions. The old *Anerbenrecht* required that the estate would descend to one heir only without division among the several. The other heirs received in those old days a very small share and the *Anerbe* could not sell the estate, unless he sold the whole. Indivisibility and inalienability however are no longer the essential features of the present *Anerbenrecht*. In most of the States the proprietor is allowed to

¹ See Cecil, p. 138.

nominate either during his lifetime or by will which of his heirs should succeed him or in other words who is to be the Anerbe. In case of death intestate and without nomination however usually Anerbe is found by the rule of Primogeniture."¹

¹ In some, *e.g.*, Westphalia and Oldenburg, the ultimogeniture is followed.

CHAPTER V

TRACES OF PRIMOGENITURE IN RUSSIA, CHINA, AND JAPAN

The part which the Slavonic race is playing in the economic and social progress of our time, and the striking similarity of its early institutions with those of India necessitate the inclusion of the study of the history of the institution under review among these slavs. Indeed the study of the modern customs and ancient laws of Russia is almost indispensable in the comparative history of the institution. The study of Russian legal antiquities may, to a certain extent, be considered as a necessary appendage of inquiries in Indian institutions. Yet it must be confessed that the sources of our information are very limited. Having no access to the Russian language I had no opportunity of studying in detail the numerous survivals which still there are of a state of things once prevailing in Russia.

Sir Henry Maine in his survey of Slavonic family law mainly relied on the well-known Bohemian or Czech poem, "the Trial of the Princess Liubouscha," and from this he arrived at the conclusion that in the most remote period of Bohemian history a sort of undivided family or house community was in undoubted existence. Unfortunately however, the poem on which he builds this conclusion is now unanimously declared both by Slavonic and German scholars to be a forgery by the well-known Bohemian philologist, Hanka.¹

Before proceeding to delineate the character of the early Slavonic family law it thus becomes necessary for us to name our authorities and then to draw our conclusions therefrom.

¹ Modern Custom and Ancient Law of Russia (Kovalevsky), p. 5.

The earliest evidence as to the social relations of the Eastern Slavs, whose confederacy was the beginning of the Russian state, is contained in the so-called chronicle of Nestor.¹ It will be beyond our purpose to stop here to see what information as to the family life of these early Slavs we can gather from the chronicle. It seems to establish the fact that marriage in the sense of constant union between the husband and wife was not a general institution among these Eastern Slavs. With the exception of the more civilised Polians, no other tribe is stated to have any notion of it. This, of course, may not mean that all alike were entirely ignorant of the meaning of family life. The mode of constituting a family might not have corresponded to the idea entertained by the author of the chronicle as to matrimonial relations. The Radimich, Viatich, and Sever captured their wives after having previously come to an agreement with them. Here is an example of what ethnologists have named as 'marriage by capture,' though it may not meet with the approval of a Christian.²

According to the Chronicler a very low state of morality prevailed amongst these early Slavs and he is directly confirmed by another mediaeval author, the unknown biographer of St. Adalbert. It will serve no useful purpose to give in details the charges of immorality brought against these Slavs by the

¹ Nestor is supposed to have been a Russian monk of the eleventh century (Kovalevsky, p. 5).

² The Drevlians were even less advanced as regards the intercourse between the sexes. They also had games at which women were captured; but not a word is said about any covenant entered into by the captor and his supposed victim. Neither is any mention made of these games being held on the outskirts of villages, a fact which would point to the existence of a sort of exogamy forbidding unions between persons of the same gens. In the description given by the Chronicler of the Drevlians we have an instance of unlimited licence, whilst in that of the Radmich, Viatich and Sever we find a picture of an exogamous people (Kovalevsky, p. 8).

mediaeval monks. All that we should notice here is that in these several immoral customs all partisans of the theory of the matriarchate would find ample materials to say that the early Russian family was matriarchal and not patriarchal as was erroneously thought by Maine. One feature of the matriarchal family, the lack of any prohibition as to marriages between persons who are sprung from the same father or grandfather is mentioned more than once by early Slavonic writers. These are also frequently mentioned in the epic poems of the Russian peasants, the so-called *bilini*.¹ Another fact supporting the theory is the large independence enjoyed by the Slavonic women of old days.² The Bohemian girls were free to dispose of their hearts according to their own wish and the oldest legal code of this people, the Sniem, seems to favour this independence by recognising the right of the women to be free from any work, except that which is connected with the maintenance of the household. To all these characteristic features of the matriarchate we may add this very important one, that, according to the old Russian law, the tie which unites a man to his sister and the children she has brought into the world is considered to be closer than that which unites two brothers or the uncle and nephew. In a society organised on the principle of agnatism, the son of sister has no reason to interfere in the pursuit of the murderer of his uncle. "In case a man shall be killed by a man," decrees the first article of the Pravada of Yaroslav,³ "vengeance may be taken by a son, in case his father has been killed; by the father, when the son falls a victim; by the brother's son and by the son of a sister." These last words are omitted in the later version of the Pravada,

¹ Endogamous marriages still occur in some parts of Russia. See Kovalevsky, p. 14.

² Cf. Cosmas Pragensis quoted by Kovalevsky:—"It is not the men who chose the maid, but the maids themselves who take the husbands they like, and when they like." See Kovalevsky, p. 15.

³ The *lex barbarorum* of the Russians.

a fact which shows the increase of agnatic organization, but they are found in the version generally recognised as the most ancient.¹

If the theory of the matriarchate finds a basis in the past history of the Russian family, its present condition seems to prove that the next stage in its evolution was the *household community*, composed of persons united by descent from a common forefather and accompanied by that worship of ancestors which usually resulted from it. The complete subjection of the wife to the husband, and of the children to the father, community of goods and the common enjoyment of their produce by the relatives living under the same roof, the acknowledged superiority of old age and of direct descent from the common ancestor, the total absence of testamentary dispositions of property and even of that mode of legal succession which supposes partition, and the exclusion of the more remote by the nearer kin, the elimination of women from participation in the family state because marriage makes them aliens, all these features of the patriarchal family appear in the modern constitution of the Russian family.

It will be beyond our purpose to study in details the characteristic features of the family constitution of the Russian peasant. Nor would it serve any useful purpose to examine how even now importance is attached by the Russian peasant to agnatism, and what part ancestor worship plays at the celebration of a country wedding.²

¹ The close tie between brother and sister, between the uncle and the sister's children, still exists among the Southern Slavs. See McLennan, "The Patriarchal Theory," Chap. VI.

² Before becoming a member of her husband's family, the bride must sever all the ties which have hitherto bound her to the house-spirits under whose protection she has passed her youth and must solemnly adopt the worship of those of the family into which she is about to enter. (Kovalevsky, 33.) This public manifestation of a change of worship is most clearly seen in the wedding ceremonies. In Lika the bride before

I would however impress on you that in a society, in which the interests of the family constantly prevail over those of the individual, there is little room for marriages contracted by the mutual consent of the young people; and this is certainly the case in all patriarchal societies. In Russia the clergy very early endeavoured to put an end to the arbitrary manner in which parents disposed of their children's future, but the force of custom and feeling that supported it were so strong that the only measure which the ecclesiastical Statute of Yaroslav of the eleventh century could introduce for the protection of the freedom of marriageable children was the one by which a fine was inflicted on the parents of a daughter who, after a marriage contracted against her will, had committed suicide.¹

Leaving aside the Russian family as a kind of natural society, created by marriage and continued by the birth of children, it will be necessary for us to stop here to examine in details that peculiar mode of family communism once prevailing in Russia in which numerous persons, sometimes amounting to fifty and rarely less than ten, are to be found united in a common household, living under the same roof, and taking their meals at the same table. A family constituted after this

leaving her father's house, would go three times round the hearth, prostrating herself each time, as if to implore forgiveness. When she is once in the bridegroom's house she is obliged to perform another ceremony; she must seat herself close to the hearth in order to keep, for a short time, the fire burning thereon by pieces of wood thrown on to it with her own hands.

The custom just described exists all over Bulgaria and has been very often alluded to by ethnographers like M. Bogisics.

In Little Russia the bride, while her father is discussing the question of her marriage with bridegroom's party, is obliged by custom to remain near the hearth towards which she stretches out her hand thereby expressing her desire still to remain under the protection of the house-spirit, the so-called "domovoi."

¹ Kovalevsky, p. 17.

fashion is known under the name of "the joint family" or "House community." This undivided household of Russia has recently been the subject of numerous and serious inquiries on the part of the Russian ethnographers and it is the result of their investigations which concerns us much here.

It has now been established by these ethnographers that the undivided household of the Eastern Slavs is a very ancient institution. The 'gens' organisation of the Polians, a Slavonic tribe, is mentioned in the Chronicle of Nestor. They are stated to live, each ruling his own kindred or gens¹ and occupying distinct localities. "This rather obscure text authorises the supposition that the Polians were divided into independent house-communities, each of which possessed its own piece of land."² The Pravada of Yaroslav³ already referred to also contains references to these undivided households. There has been a great deal of controversy over the meaning of the word 'Verv' contained in the Pravada and the accepted view now seems to be that it is used there in the sense of undivided household or house community.⁴

The different versions of the Pravada were drawn up during the eleventh and twelfth centuries. If we pass to the end of the fourteenth and the beginning of the fifteenth centuries, we find the same community mentioned as well in the North-Western principalities of Russia, as in those of the South-West. The name given to the members of these communities was *siabri*, and this term is employed both by the judicial charter of Pscov and by the statute of Lithuania which ruled the South-West.⁵ The term *siabri* however is not the only one used by

¹ *Rod Svoi.*

² Kovalevsky, p. 49.

³ A sort of mirror of Justice compiled in the middle of the 11th century by order of the Grand Duke of Yaroslav.

⁴ Kovalevsky, pp. 50, 51.

⁵ This word 'siabri' is also to be found among the southern Slavs. The Code of Servian laws, published by King Stefan Douschan in 1349, makes frequent use of it when speaking of the peasants.

the old Russian writers to designate the members of such a household. They are often spoken of in the financial survey of the 16th and 17th centuries under the characteristic name of hearth, *pechische*. The *pechische* of the fifteenth and sixteenth centuries corresponds to the Feu of Burgundy and is even known by that name in some of the northern provinces of Russia. The house community itself is often termed *Ognische*, a word which means the hearth fire, thus showing that what constituted the tie between members of the same household was their possessing a common hearth.

Whatever that be, communities of persons belonging to the same kindred and living under the same roof are still in existence almost all over Russia, particularly within the boundaries of the old Muscovite empire. Among the members we find the grandfather, and grandmother, the father and mother, sons and daughters, grandsons and granddaughters, brothers and sisters, nephews and nieces, with such other persons as may be united to them by ties of marriage. Persons incorporated into the family, working for the common good and having shares in the family profits are often mentioned by writers on Russian Folk-lore. Besides these, persons adopted into it, or the children of a widow contracting a new marriage with a member of the community would also become its members.

These undivided households are, as a rule, governed by the oldest member of the community. In extreme cases,¹ however, the oldest member may be superseded by another, sometimes elected by the whole community. This house-elder is designated as *bolschack* meaning the greatest in power. His authority and functions perfectly correspond to those of a Servian *domachin*. He is assisted in the difficult task of governing the female part of the community by some aged woman, *bolschoucha*, who need not be his wife.

¹ E.g., in case of prolonged illness or want of mental power. Cf. Hindu Law, Sankha and Likhita,—दीने प्रोषिते चार्त्ति गते वा ज्येष्ठोऽयान्, etc.

The Russian house-elder is but *primus inter pares*. He has neither the authority nor the amount of independence of the Roman paterfamilias. All the grown-up members of the community constitute a sort of family council, whose advice practically regulates all matters of importance. The bolschack has no right to dispose of the family possessions without the unanimous consent of all the persons for whom he acts. Of course the consent only of the grown-up members need be taken.¹ The women's opinion, though of less importance than the men's, cannot however be disregarded altogether.

This house-elder had however the exclusive right to represent the community before the executive and judicial authorities of the village and district.² It is he who regularly appears in the courts, either to answer the complaints against the community, or to insist on the recognition of rights which have been violated. It is to him also that the government officials address their demand for the speedy payment of the taxes. It is his duty to attend to the execution of the law concerning military service, and to the carrying out of the different orders issued by the local and provincial authorities.

In the internal administration of the household also the house-elder has onerous duties to discharge ; and it is the duty of the house-elder to find occupation for the unemployed members of the household. If the community is too large to allow of all its members being employed in agricultural labour, the family finds it advantageous to permit a certain number of its members to seek their fortunes abroad as ' ofini,' ' chodebocschiki,' ' korobhniki ' and ' prosoli.' Young orphans find in the person

¹ Cf. The position of father in Hindu Law :—

५. स्त्रावरं विपदश्चैव यद्यपि स्वयमर्जितं
असम्भूय सुतान् सञ्जीन् न दानं न च विक्रयः ॥

See Mit. अमासव्यवहारेषु पुत्रेषु पीत्रेषु चागृह्णाणादावसमर्थेषु भातृषु वा तथाविधेषु अविभक्तोऽपि

.....

² Selo i volost.

of the house-elder their legal guardian. In the administration of the family fortune it is the house-elder who makes all arrangements that are needful to secure that every kind of agricultural labour shall be properly done, assigning to each his daily share in the ploughing, harrowing, and sowing of the fields and threshing of the corn. It is again the business of this elder to sign all contracts of sale or exchange that may be needed for the community ; but those under his charge have always the right to control his actions and to demand a full account of all the moneys received or paid by him.

The resources by which the family provides for all its requirements are either derived from the lands it owns or from the private earnings of its members. Widely separated though some of its members may be from the family, nevertheless they all look upon it as a duty to allow their family to share in their earnings. These as a rule make no claim to keep their earnings for themselves.¹

From what has been said of the house community it would appear that the position of the house-elder is anything but that of an owner of the communal property. His is a responsible office having practically no privilege attached to it.

It will not be out of place here to say a word in praise of this institution. No one would fail to see its merit which consists in the fact that it develops to a very great extent the feeling of mutual dependence and joint relationship without which no system of social reform can have any chance of success. Possessing as they do no other but the common property and having only an equal share in all the material enjoyments of fortune, the members of these communistic

¹ The *peculium castrense* and *quasi castrense* of the ancient Romans appear still to exist among the members of the Russian household. If a movement in favour of the establishment of private property is perceptible it is only in the private earnings of the women and girls in their leisure hours.

bodies escape from the disheartening influence of economic competition. The condition of this existence necessarily develop in them all the consciousness of mutual responsibility and the conviction that without reliance on one another they cannot overcome the danger and difficulties of life. It would be a study of high psychological interest to analyse the character of a people which had grown up under such conditions, and to show how far the inborn selfish instincts of man have been moderated by the softening influence of a state of society which, to a certain extent, does away with the necessity for an uninterrupted struggle for life. It may however certainly be questioned how far the loss of a spirit of personal enterprise and the removal of a strong feeling of self-reliance ought to be considered beneficial.

But the relative advantages and disadvantages of individualism and of communism have furnished matter for warm controversy ever since the time of Plato and we need not stop here to renew the dispute. All that we should notice here is that even the Russian peasant is not insensible to the advantages of individualism, and if divisions of family property were rare before 1861, the year of the abolition of Serfdom, the reason lies in the fact that the manorial lords and the State were alike interested in the preservation of the system of *Undivided Households*. It is for the interests of the national treasury that divisions should not take place and this is why the Government, even in recent years, had taken measures to prevent further divisions, the decision, in the matter, being taken away from the majority and placed with the chief of the household.

Unfortunately we do not know anything more of these Household communities which might enable us to say definitely whether or not the germ of primogeniture is to be found therein. The impartibility of the property belonging to the community and its management by a single head are the two things that deserve our notice. A quest after the germ however will not

complete till we are in a position to review the subsequent development of land laws.

Sir Henry Maine has pointed out that village communities represent a distinct period in the social development of mankind, a period which ought to be placed between the patriarchal and the feudal periods. That there has been such a period in the social history of Russia is now admitted on all hands. Endeavours however have very often been made to explain their existence among the Russians by the peculiarities of their national character,¹ and we need not stop here to review all these various attempts. It seems to be established beyond

¹ The first notice of the Russian mir appears to have been taken by Baron Hauthansen, and he noticed the antiquity of the Russian agrarian community and its likeness to the social and economic institutions of the Southern and Western Slavs. This provoked two articles from a Muscovite professor, Chicherin, who strongly protested against the opinion that Russian village communities were the direct descendants of these undivided households which so commonly form part of the historical past of most Aryan nations. Chicherin believed that the villages were partly the creation of a Government anxious to secure an easy method of collecting the taxes and partly due to the landed aristocracy which could find no better means than an equal and periodical re-distribution of the land for attaching to the soil those classes of the people who were reduced to the condition of serfdom. This extraordinary assertion immediately met with a systematic denial on the part of Belialev, the well-known professor of Legal History, who was one of the colleagues of Chicherin. The study of the origin and growth of Russian village communities has never been discontinued. Subsequent studies have rendered familiar the notion that they were the spontaneous result of the social development in Russia; that the Government by interfering in their internal constitution has only succeeded in obscuring their national character; that mutual responsibility in matters of taxation was foreign to their original organization; and that there is ample foundation for the statement that their members were at first free possessors of the soil and not the serfs of the Czar, the nobles and the clergy.

See Kovalevsky, pp. 69-71.

controversy that the earliest mode of land tenure in Russia was the holding of it in an undivided state by the members of a house community, the chief characteristic of this holding being that though the land remained undivided and lay open as it had done for centuries before, every member of the household, nevertheless, was the possessor of a share in the various fields belonging to the family. These shares were not equal, but varied according to the rights of inheritance appertaining to each of the holders.

It will be beyond my purpose to give in details the several steps by which the village communities developed from the house communities.¹ Suffice it to say that when brothers and nephews gradually thought of living separately they abandoned the old system of using in common the produce of the early harvest, and divided the area of the arable land in unequal shares, proportioned to their rights of inheritance. Besides each partner having a right to sell his portion or a part of it to another, the village would soon become occupied by neighbours owning the most unequal portions in the field. The meadows however for the greater part of the time would be kept undivided, subject here and there to a yearly distribution according to the wants of each homestead. The pasture and forest land would also remain subject to a community of ownership and would sometimes belong to several neighbouring villages. In such a case these villages would constitute the 'Volost,'² each of the inhabitants of which would be allowed an unlimited use of the undivided area, it being extensive enough for the purpose. A non-villager however would have no right to enjoy its pastures and forest lands and in this way such lands were not in any sense a mere *res nullius*.

¹ Those who feel interested in this may see Kovalevsky, pp. 75-76.

² Similar to German "*Mark*."

The vastness of the area and the fact that certain parts of Russia remained unpeopled for centuries,¹ made it impossible for the communes to have similar growth throughout. Its growth has been stopped in one place at an early stage, and in another at a later. The evolution did not proceed further than what has been described above in the northern parts of Russia. In the south however it went further. The undivided households and their immediate successors, villages composed of shares in the same ground, were wellknown in this part of the country. The undivided 'mark' on which every homestead had the right to take fuel and pasture its cattle is known here under the name of lands belonging to the *gromada*, or commune. The colonists who during the 16th and 17th centuries crossed the Dnieper in order to occupy the free steppes in the modern Government of Tchernigov, migrated in companies, called *Skladchina*, organised on the model of undivided or partly divided households. The area on which the colonisation took place was so vast that each *Skladchina* was allowed to sow as much ground as it was able to till. After the harvest it was no longer necessary to till the same lands, a new piece being available for agricultural purposes.

So long as the population would be small enough redistribution of land would not be thought of. Hence in those early days no mention is ever made of the *runrig* system which characterises the modern village community of Russia. In time however some control became necessary and, at the command of the village-elder, the head of each homestead proceeded to trace with his own plough the limits of the ground he intended to sow, and no one was allowed to extend his cultivation beyond the limits thus settled. In course of time the right of retaining these parcels of ground was extended to a period of three years at the end of which period they

¹ Partly on account of their physical condition and partly owing to their insecurity due to the periodical invasions of the Tartars.

returned to the commune for new appropriation or new allotment.¹

While this was the state of things on the banks of the Dneiper, a similar evolution took place on those of the Don. Here even a larger area awaited the arrival of those Great Russian colonists who were to found the so-called territory of the Don-Cossacks. For a while the ground was declared to be the common property of the whole community, and each family was allowed to sow and mow wherever it liked. Gradually however large villages, called *stanitza*, were found, the land being divided among these villages. Each village received its own area of arable and meadow ground,—pasture and waste lands still remaining the common property of the whole people of the whole *army*. The unlimited right of appropriation given to the private homesteads was scrupulously maintained by these *stanitza* with the result of great inequality in the distribution of the land. This inequality was established in favour of a minority of families out of which the elders of the people were regularly chosen. In time however the grievances of the majority, who had smaller parcels but were more powerful in the village folk-motes due to their number, had to be redressed. Various economic arrangements were devised: redistributions of land in order to equalise the share were very often prescribed and the system of *run-rig* tenure made its first appearance.

It must have been noticed by you all that all the districts we have passed in review had one thing in common; serfdom was unknown to them all. The *péasants* were the independent possessors of the soil, the true owners being partly the villages

¹ Similar limited private appropriation was allowed in the meadows, forest lands and pastures. At the end of May a day was fixed when all the villagers were assembled for the hay harvest. Each *house-elder* marked with a scythe the limits of the meadow he intended to mow. It was the duty of the village-elders to see that these limits were strictly observed. (Kovalevsky, pp. 79-80.)

and partly the *volost*. No doubt we hear of the "best men," "the men of wealth" "jitii liudi" side by side with "molodschii," the smaller men; but all these were nevertheless free men, the various expressions only indicating inequality in shares already referred to. Some few seem to have no part at all in the possession of the soil, being known as *Podsousedi* or *Podsousedki*, which means living under the authority of a neighbour or villager—*sosed*. These persons were regularly employed as agricultural labourers. Some few, the so called '*bobili*' were possessed of small parcels of land resembling in that the cottarii of Domesday Book. The agricultural area owned by each homestead was known by the name of '*jrebii*,' which was a plot of land enjoyed by a single household out of the agricultural area of the mark, a plot which, as has already been said, need not be equal to those of the neighbours. Serfdom was quite unknown and no mutual responsibility in matters of taxation bound the peasant to the soil he occupied though later on taxation was based on lands occupied by the households. The unit of taxation was *socha*, the land of a plough and the *volosts* were to distribute the taxes imposed on the villagers according to the quality of the cultivated land possessed by them. This however did not bind the households to the soil and an undivided household very often quitted their dwellings in order to settle in some neighbouring country, on lands still free of occupation, or on those liberally accorded to new comers by their private owners, on condition of a small payment, the abandoned ground returning each time to the *volost*.

The first dawn of Feudalism or Serfdom perhaps is to be met with in the later dependent communes which were established on the possessions of the higher clergy and the monasteries. Each of these dependent households was no doubt obliged to perform agricultural labour on the area belonging to the landlord; but the peasant had the right of free removal, and the social arrangements of the Russian manor, so far as the

ownership of land is concerned, resemble those of a free village.¹

It will be beyond our purpose to trace the development of these villages beyond what has already been done. Two facts seem to be responsible for the change: the first was the increase of population² and the second is the change in the basis of taxation.³ Whatever may be the reasons which have produced the change, there has been a complete revolution in the internal organisation of these villages by the introduction of the principle of equal division of the soil among its individual members and of the periodical allotments in order to secure this equality.

Up till now we find very little of primogeniture in the Russian land system. No doubt both in the office of the house-elder and the village-elder we might expect such a personage as a primogenitus; but both these offices being ever elective in Russia, the first in birth could not gain any footing there as a matter of right. Besides these were mere offices, and the holder of them were never mistaken as the owners of the property belonging to the household or the village.

Here we might say a word about the later service tenures and see whether the field there was fertile enough for the growth of primogeniture. Up to the middle of the sixteenth century the nobility, the *boyars*, were the only persons admitted to the exercise of executive, military and judicial authority. Under the name of *Voevods* we find them at the head of provinces commanding their military forces and managing their administrative interests. Money being scarce, these *boyars* were paid for their services by the grant of crown lands, this

¹ See Kovalevsky, pp. 89-91.

² We have already noticed how this sooner or later induces the majority holding small shares to force the rest to a redistribution of the soil.

³ Peter the Great abolished land tax and introduced the capitation tax in 1719. Mutual responsibility principle was also introduced

mode of payment being known under the name of '*Pout*,' the *boyars* themselves being surnamed "*Poutevii boyari*." Most of these *boyars* were exempted from military service and were distinguished as "*wedennii boiari*." The peculiarity of mediæval Russia consisted in the fact that it left to the knightly class the liberty of freely choosing the prince whom they would like to follow. The Russian knightly class, the so-called '*slougili liudi*' or '*man of service*' were authorised by custom to change from one prince to another, and this freedom perhaps is responsible for the fact that even here primogeniture could not get its footing.¹

It may be noticed here that the Russian nobility—*dvorianstvo*—does not originate from its old princely aristocracy. No doubt among the nobility there are a certain number of old families of much better birth than even the reigning house of the Romanos.² But, as a rule, it has nothing in common, as to origin, with the old chiefs of the Principalities. Even in the etymology of the word '*dvorianstvo*,' which is the name given to the nobility, there is nothing of sovereignty or high origin.

at the same time and both land-lords and peasants were allowed to take preventive measures against those who might seek to escape the obligation by withdrawing from their habitations. When this revolution was accomplished and each household began to be taxed, not according to the quantity of land it owned, but according to the number of persons attributed to it in the taxation return, the old division of the village area, which certainly paid no heed to the number of persons in a house, was felt to be obnoxious, and so redistribution was demanded.—Kovalevsky, p. 95.

¹ The increasing power of the Grand Duke of Muscovy could not tolerate this survival of *Federal* autonomy and gradually this freedom of change was taken away.—Kovalevsky, p. 157.

The Grand Duke began to confiscate the grants of land, pomestie, of departing knights and every time he could lay hands on one of these seceders he was sure to throw him into prison.

² Tikhomirov, *Russia, Political and Social*, Vol. I, p. 225.

"In old times the servitors of the Prince who were lodged and fed in his court (dvor) were called 'dvorianie'""¹ and amongst these were even slaves. The Russian nobility really takes historical origin from the men of service, *slougilie lioudi*—to whom the Muscovite tzars gave money and estates that they might be in a condition to perform military service.² These *slougilie lioudi* were made up partly of the descendants of the ancient royal guards—droujina—of boyars and partly of the princes who had entered the services of the tzar.³ To a large extent however they were recruited from adventurers. As has already been noticed this nobility were mostly paid in landed property which was designated *pomiestie* and was strictly service tenures, being given only in exchange for service and resumed when the service ended.⁴ Gradually however the property became hereditary even in the female line, and Peter the Great ended by regarding it as the property of the holder independently of any services. At the same time the nobility were organised as a class and bound to perpetual service of the state quite irrespective of landed property.⁵ One effort of the Muscovite Government was to transform this nobility into an administrative class, and with this object in view made various attempts at bettering the condition of the class. Regulation after regulation for education, sanitation and various other details concerning the class was passed; but the nobility itself was opposed to all such interferences. A regulation was also passed founding *majorat* for the nobility with the hope perhaps that thereby family grandeur of the nobility will be best secured by preserving the domains in few hands. But

¹ Tikhomirov, Russia, Political and Social, Vol. I, p. 226.

² *Ibid.*

³ Kovalevsky, p. 158.

⁴ Tikhomirov, p. 227.

⁵ Tikhomirov, p. 228.

Henceforth service is ranked more highly than birth.

here again the nobility itself strenuously opposed the measure and it had to be abrogated.

We have reviewed several institutions of ancient and mediæval Russia where primogenitary rules might be expected; but nowhere we have found such rules. The next topic that we propose to take up is the Regal succession and here at least we shall not be disappointed altogether.

We need not stop here to examine how far Tzarism, the unlimited power of the Russian Emperors, is a truly national institution. You will certainly feel amused to know that a few years ago, the Russian Minister of Public Instruction, Count Delianov, ordered professors of public law and of legal history to make their teaching conform to a programme that would declare this Tzarism a truly national institution, the only thing consistent with the genius and with the historical past of the Russian people. Those of the professors who refused to comply with this order were either dismissed or called upon to resign.¹

Whatever might have been the opinion of these ministers of Public Instruction, it is now established by various scholars that Russian autocracy is not a thoroughly national institution, and its roots are not to be found in the remotest period of Russian History. The Byzantine principle of an unlimited monarchical power, having no other source but its divine right derived from God himself and being responsible to no one but Heaven, has not always been recognised in Russia. Had such been the case the historical development of Russia would form a monstrous anomaly to the general evolution of political institutions, at least among the people of Aryan blood.²

Whatever that be, Russia has known of folk-motes from the

¹ Kovalevsky, pp. 119-120.

² Byzantine Chronicles are unanimous in the assertion that the Slavonic people knew nothing of a strongly centralised autocratic power. Kovalevsky, 121.

primitive days.¹ The competence of the Russian folkmote was wide enough to enable it to assume more than once the right of choosing the chief ruler of the land. It was however not an unrestricted right which they enjoyed, the choice being confined to members of the family of Rurik. The Russians considered that outside Rurik's dynasty no one had a right to exercise sovereign power. The folkmote was however empowered to give its preference to some distinct line of the house of Rurik, and was also free to pronounce in favour of a younger member of that family notwithstanding that an older one was also a candidate. But for this choice the legal order of succession maintained by the dynasty of Rurik was very similar to the Irish law of tanistry already noticed, according to which the Irish Crown devolved upon the oldest representative of the reigning family. It would very often mean the succession of the deceased's next brother, not that of his eldest son. The new ruler, whether by election or by legal succession, was only admitted to the exercise of sovereign power after having subscribed a sort of contract, *riad*,² by which he undertook the obligation of preserving the rights of those over whom he was called to rule.

Of all the principalities of Russia those of the North-East seem from the remotest times to have been unfavourable to the growth of popular assemblies, and thus favourable to the primogenitary rules in regal succession. In those of Sousdal and of Riasan, the dukes very early freed themselves from the necessity of election by the people by establishing primogeniture

¹ The Folkmotes were not periodical assemblies, but were convened as often as there was some question of State which needed public discussion. It will be interesting to note here that in early times the decisions of the people had to be unanimous. (See Kovalevsky, p. 122.)

The Bohemian Folkmote was called the *Snem*.

² These compacts or covenants between prince and people were really a kind of constitutional charter securing to the people the free exercise of their political rights.

as the law of succession to the Crown. As has already been noticed elsewhere, the way in which this could be established was by associating the eldest son, during his father's lifetime, in the exercise of sovereign powers. Vsevolod III was the first prince who benefited by such a course, and who secured the throne to his descendants, thus annulling one of the most important rights of the Folkmote, that of choosing the ruler of the land. From the middle of the thirteenth century no mention is made of the popular assemblies of Soudal, and the rule of primogeniture determines succession to the throne.¹

So long as these Folkmotes or Popular assemblies were powerful enough to wield political rights, primogeniture had no chance even in regal succession. We have seen how with the wane of such assemblies primogenitary rules could develop in some of the principalities. Or rather it was the introduction of the primogenitary rules that caused the decay of the assemblies. Yet there is no necessary connection between the two. For when these Folkmotes ceased to exercise this right of election, the other, the primogenitary rules, did not everywhere replace it. The great change which the subjection of the prince to the power of the *Khans* brought about in the relations between the prince and the popular assembly did not produce this result. Folkmote's right of election was gone—but the new mode of receiving investiture at the hands of the *Khans* did not necessarily involve any question of primogenitary rule. The prince had no longer any need to trouble himself about his acceptance by the popular assembly of the principality he intended to govern. All that was necessary was to undertake a journey to the southern parts of the Volga

¹ During the middle ages Russia was a loose Federation of principalities in which the people were wont to exercise legislative, executive, judicial and political powers along with the prince—the *Krias*. The power of the prince increased gradually to the prejudice of the power of the Folkmote or *Viche*.

and make his appearance at the court of his Suzerain, the Khan, where he had only to lay out large sums of money in presents and bribes until at last the Khan was pleased to grant a charter, *jarlik*, acknowledging the right of the claimant to occupy the throne.¹

China is admittedly the oldest civilized country in the world. The general resemblances between
Ohina. China, Egypt and the kingdoms of Mesopotamia have been noticed by many writers, who regard them as accidental, or at least as the result of similar, not identical, antecedents. Simcox² however have brought out several facts that accentuate the resemblances and point to the community of origin. "Leaving all open questions of affinity," says Simcox, "to be decided by the learning of the future, we are certainly in a position to affirm that before the so-called Aryans and Semites of history took the foremost place in the Old World, probably before they were clearly differentiated, the first civilized states in the world were founded by men of some other race—humane, industrious, non-political, but with a moral philosophy for the use of princes; liberal in the treatment of women, with the most unchanging customs of any people that ever lived, and with the most enduring records of their life. By analogy we should expect all these states to belong to the same ethnological family; but if the identification cannot be maintained, the similarity of temperament and institutions which suggested it only becomes the more noteworthy; as if the social order formulated by Chinese and Egyptian rulers were not merely one natural view, but in fact the first or only one that presents itself to a primitive community as either natural or possible."³

¹ From the beginning of the 14th century the Muscovite princes had no longer to undertake the journey in person; he had only to send the money whereupon the Khan would forward the Charter.

² Primitive Civilization, Vol. I, pp. 14-18.

³ *Ibid*, 33.

Indeed the course of events in China was exactly parallel to that in Egypt already referred to. "The hereditary princes of the South were the counterpart to the Feudal princes of ancient China, and like them supplied pretenders or local independent kinglets, whenever the monarchy was weak. The correct style of address from the emperor to the princes was 'uncle,' while in Egypt under the first dynasty 'royal cousin' is the stock designation of those high in office-of-favour at court. The local princes in each case were considered as kinsmen of the sovereign, or rather, the ruler was regarded as sharing their descent from the principal families of the united race. In China the different branches of the black-haired people were forced to cling together by their position, surrounded in every direction by barbarous foreign tribes; and the nation fared best when the monarchy was strongest, the king's kinsmen ready to serve as his ministers, instead of rivalling him in the surrounding states; but when the decline of the Chow dynasty began, towards the 9th century B.C. the states began to assert their independence and periods of confusion followed. Probably both in Egypt and China kings succeeded the local chiefs exercising less than royal powers; but it is also probable in Egypt, and certain in China, that a feudal period followed one of primitive monarchical centralization."¹

¹ Simcox, *Primitive Civilization*, Vol. I, p. 40.

Laveley in his 'Primitive Property' assures us that "the history of property in China and at Rome is very similar to that which we just sketched for England. The oldest Chinese chronicles represent that country as having already arrived at the agricultural stage; but private property was not yet applied to the soil. The land was divided among all those who were capable of cultivating it, that is, among the inhabitants between twenty and sixty years of age. Each valley had an independent administration, and elected its own chiefs; the sovereign being also elective. These officers had certain lands assigned to them, the produce of which enabled them to live according to their dignity. This is exactly the same system as we have seen in Germany. From

Whatever that be, the oldest accounts that we have of these Chinese show them as agricultural people. Indeed in the present days, as in all other Asiatic countries, so in China, the main industry of the people is agriculture. More than 80 per cent. of the vast population of that ancient country are agriculturists. Carpenters, smiths, men of letters, officials, etc., make up the remaining 20 per cent. This agriculture is not a new industry, as it is in many countries of the West. The oldest Chinese chronicles are full of references to agriculture and agricultural methods. The most ancient and sacred Chinese

the year 2205 B.C., the empire became hereditary. The provincial chief also usurped a hereditary right of succession. The sovereign made grants of lands reserving certain rents, and the lords in turn did the same. A kind of feudalism was thus established; the property cultivated by the peasants, however, continued to be divided among the families proportionally to the number of hands which each could command. In the partition, the distance of the lands was taken into account, and a smaller portion given in those which were nearer at hand. One lot in nine had to be cultivated for the benefit of the state by the families who obtained the remaining eight. The system of common lands, *Gum Tian*, was maintained until about the third dynasty, 254 B.C., and lasted to our own times in the remote districts of Corea. Private property was introduced by the house of Zin: but gradually, as the chronicles tell us, the rich usurped all the lands, and then let them to the ejected cultivators, reserving half the produce as a rent. The Government has since, at different times, had recourse to agrarian laws to augment the number of proprietors. The most remarkable and the most general of these laws is that promulgated by the Tan dynasty (619-907). Every individual, provided that he had a separate house, received a portion of land in perpetuity, and a second piece temporarily, conditionally on his being in a position to cultivate it. The portion assigned to the different classes varied according to their rank and dignity. The private property was inalienable, except in extreme cases. Life estates returned to the state, to be re-distributed. This system did not long remain in force; about the year 1000 it gave way to absolute private property, which, notwithstanding the Mantchou Conquest and revolutions, has survived to the present day."

chronicle extant is "I-Ching" or the "Book of Changes" and it has as much history with the Chinese as the Vedas have with the Hindus of India. Dr. Moule, in his "Chinese People," says: "Turning to the records of ancient China preserved in the 'I-Ching,' the Book of Changes, the highest authority for every thing relating to human affairs amongst the Chinese and the only one of the classical books spared from destruction by Shih Huang-ti's decree—and more especially in the Shih-Ching or 'Book of First National Songs of the Chinese,' we have a continuation of that yet more remote history which the primitive characters of their language have revealed to us.....Quoting then, from an appendix to the book, we are informed that Shen Nung (28th century B. C.) fashioned wood for the share, and bent wood for the plough-handle, *ploughing* and *weeding* (the Chinese are an example to the whole world here, and the virtue of weeding is repeatedly insisted on in the Odes) were taught to all under heaven."¹ We, therefore, can safely conclude that agriculture in China, more or less in its present form, is about fifty centuries old, if not very much older. Writing about the place of agriculture in the estimation of the Chinese, Dr. Moule says: "Agriculture holds the first place in the estimation of the Chinese among the branches of labour, ranking next after scholarship and letters, in the fourfold division of society, for the king himself is served by the field."²

But although improved methods of agriculture were known to the Chinese even in pre-historic days (for it is not unreasonable to assume that history itself is not as old as the ancient Chinese Civilization), private property in the soil was not recognised in the earliest times. The notion of "individual" in the European sense of the word is absolutely foreign to the

¹ "The Chinese People" by the Ven. A. E. Moule, D.D. (a missionary to the Chinese), pp. 141, 142.

² "The Chinese People," Moule, p. 69.

Chinese idea of society. The family, and not the individual, was the unit of society. The society was the agglomeration of thousands of families, all of whom owed allegiance to the king. Like the patriarch of the early Romans, the king was the formal chief of the entire community. But the king could not be expected to carry on the entire administration, single-handed. For all practical purposes his territory was divided into several districts, each of which was called a valley. The most powerful citizen in a valley (most powerful, indeed, both physically and mentally, skilled in warfare and wielding most influence over the martial tribes) was generally elected by the king to govern the valley. So it is apparent that the chief of a valley held office not merely at the pleasure of the sovereign, but also because he had ability enough to hold his own in all spheres of human activity. His son had no claim to the office rendered vacant on his death merely because he was his son, although there may have been instances of the son of the Governor succeeding his father on his death, but in all such instances he established claim to the office by his own supreme ability. Such instances, however, were rare. On the death of the chief of a valley, the king invited the next most powerful citizen of the valley to succeed him. This system went on for several centuries. But with the spread of democratic ideas, it underwent a change, and the people took upon themselves the election of their own chief. The principle however was the same. They also elected the most powerful among them as their ruler. This system was carried so far that later on, about 1600 B. C., they elected their *king*. But in China, as in other countries of the world, the time came when the sovereign and chiefs asserted themselves, and both kingship and chieftainship became hereditary in course of time. In this connection, the following passages from "China of the Chinese," a famous and authoritative treatise on China by the late Mr. E. C. Warner, for several years the British Consul at Foochow, will be found interesting: "In the earliest times the nation was

regarded as a large family, of which the chief or king was the father. The main divisions were thus the king and the people. The group of leading men around the king and those chosen to help him formed the nucleus of governmental administration. In China, under the early patriarchal chieftains, the ablest citizen was elected by the sovereign to succeed to the rulership of the people, but with Yu the Great (2205-2197 B.C.) succession in the male line of the king's family was established."

"The sovereign was regarded as holding his appointment by the will of heaven. As in all independent societies, he combined in his kingship the duties of ruler, high priest and commander-in-chief. His palace was both a temple and an audience-chamber. The tenure of his office was, however, dependent upon the prosperity of the kingdom and the people. This prosperity indicated the approval of heaven, or rather, of his ancestors in heaven, and when it failed it was the duty of the most virtuous and powerful of the provincial princes to depose him and reign in his stead."

This system endured through centuries, but the office of the king gradually became hereditary. The
 Hereditary Kingship. king consolidated the powers attached to his office. He became the secular head of the people *de jure* and *de facto*. He was not only the owner of the territories over which he ruled, but he also became the Commander-in-chief of his army. Diverse and immense powers having rested in him, he became a real autocrat although theoretically he held his appointment, as before, by the will of heaven. In statecraft he was supreme, and he trained the most intelligent of his sons carefully in that supreme art. That son, or the crown prince (if we may use that expression) often acted as a minister and sometimes as chief minister to his father. He often was the second-in-command in the Army. So after the death of the king, his ascension to the throne was an easy walk-over. He stepped, as it were, into his father's

shoes, as a matter of course. But the system was not without inherent defects. It caused jealousies among the king's other sons, and more especially, if it was a younger son of the king who succeeded his father, the jealousy of the eldest naturally became very great. With the passage of time, the king resorted to the safer course of nominating his eldest son as his successor. The eldest son was trained from his early childhood in statecraft and was kept abreast of events relating to the state. Often he was the second-in-command of the army. In this way, the custom was established for the king to nominate his successor, and as we have seen, his choice almost invariably fell on his eldest son, who was trained for the office of king from his early childhood. The other sons of the king had been assigned positions very much different from, and inferior to, the office which devolved on his eldest son. They were appointed governors of different provinces, and they had to owe allegiance to the king.

The custom of the eldest son of the king succeeding his father on the latter's death percolated to the chieftains of valleys, who usurped hereditary right to consolidate their positions and to make provision for their children. So that when a chieftain died, his eldest son succeeded him, just as the king's eldest son succeeded him on his death.

As has been observed in the beginning of this chapter the sovereign found it physically impossible to carry on, single-handed, the administration of the whole of his territory, and so he had to parcel out lands in his territory into districts, each of which was assigned to a governor, for the purposes of administration. The governor had to owe allegiance to the king, and to pay a certain amount of revenue. He was to look after the happiness of his subjects and to promote their interests, and if he failed in his duties he thought he could not carry on the administration of the province committed to his charge consistently with divine will, and so he abdicated.

But this rarely happened. In order to ensure the efficient administration of the valley of which he was in charge, he, in his turn, divided it into several sub-districts, each of which he assigned to a powerful citizen, who became responsible for the good government of his sub-district. He paid revenue to the Governor, who in his turn, paid revenue to the king; in this way a sort of feudalism was established in early China.¹

Although many of the ancient social customs of the Chinese may appear to be grotesque and queer in the eyes of twentieth century people, they are valuable as showing to us the structure of the social fabric of the ancient Chinese people and the laws that governed and kept together the Chinese family and the Chinese society. We shall consider only a few of the innumerable social customs of the Chinese and find out the grounds on which we can base our conclusions in regard to the law of primogeniture in China.² Many of these are to be found in customs relating to mourning and the unburied dead. The eldest sons occupy pre-eminently a position of much importance in these social matters.³

Traces of Primogeniture in Chinese social custom.

¹ See Simcox, *Primitive Civilization*, Vol. II, Chap. VII.

² The description is taken from Doolittle's "Social Life of the Chinese."

³ "When children or unmarried persons die, many of the customs are not observed. These are generally observed strictly at the death of an adult who is married, and is the head of a family, his own parents or grand parents having predeceased him. All the members of a family, generally, make it a point, if possible, to be present at the death-bed of the head of a family. Sons, daughters, and the wives of sons, grand children, male or female, as well as brothers and sisters and other near relatives of the dying man, as far as practicable, gather around his bedside. Immediately the death has occurred, all simultaneously break out into loud lamentation and weeping. Some explain this custom by saying that they thus bid him farewell. As all beyond death is regarded dark by the Chinese, they light candles and burn incense before the

Dr. Doolittle tells us that while the Chinese are born free, they are not all born with equal rights, privileges and duties. There are a few privileged families among the Chinese by hereditary right: but in every family which has sons born to it, one

dead body. The Chinese believe that the dead are unable to see how to walk or whither to walk and the design of the candles is to light the spirit of the dead in the infernal regions. After the body has been laid out, this peculiar custom is observed in many families. Several taoist priests are employed to prepare the 'bridge-ladder' and assist in the celebration of the ceremony, at the expense of the son-in-law or sons-in-law of the deceased. A pole, seven or eight feet high, is thrust into a socket or frame standing on the ground, in a perpendicular position. There are holes in the sides of this pole, and several tiers of sticks, each two or three feet long, are fastened into these holes. These sticks project outward and upward from the vertical post. At the extreme outer end of each is suspended by a wire a sort of glass cup containing oil and wick, the whole making up a lamp. On the top of the vertical post is placed a candle. Into a hollow, about three feet from the base of the post, is inserted a pole, projecting at a right angle, some two or three feet longer than the longest of the sticks having lamps at their end. This 'bridge-ladder' is placed in the middle of the room. On one side of the room is placed a table having lighted candles and burning incense upon it. On the wall or partition of the room by this table are suspended one or two paper-hangings, relating to the infernal regions. The body of the deceased is lying on one side of the room."

"The ceremony begins thus. The lamps and candles on the 'bridge-ladder' are lighted. The priests chant their liturgy amid the noise of cymbals. The married daughter comes forward, having a white cotton cloth fastened about her head, partially concealing her eyes, or she holds to her eyes a white cotton cloth much as one would while weeping. The *eldest son* of the deceased, if there be a living son, now advances, and, taking hold of the end of the long pole, pushes gently against it. The post turns on its socket and the entire 'bridge-ladder' moves. The wife of the eldest son, his younger brothers and their wives, the married daughters of the deceased, and her children, etc., now follow slowly the *elder brother* as he pushes around the

has special rights and privileges, if not established by law, established, at least, by general consent and common custom.

The first son of his father by his lawful wife has various peculiar privileges and duties accorded to him in view of his

'bridge-ladder' for a few minutes. In case there is no son, a married or affianced daughter leads the company. The object of this performance with the 'bridge-ladder' is to lighten and assist the deceased on his way. It is called 'bridge-ladder' because it is fancied to resemble a bridge and a ladder. The bridge would aid the dead to pass rivers and the ladder would help him to climb steep places, should he meet such impediments in his journey."

After the "bridge-ladder" ceremony is over the dead body is dressed and placed on the cover of the coffin. The *eldest son* now approaches and kneels down before the corpse. He then takes a cup of wine and offers it to the dead three times. He then takes some cooked vermicelli, by means of chopsticks, out of a bowl, and presents it to the mouth of the dead for three times. After this he takes a bowl of cooked rice, and makes a presentation in similar manner for three times. When the *eldest son* is engaged in these filial acts, the other members of the family, brothers and sisters and grandchildren, except the partner of the dead and those belonging to higher rank, kneel down around the dead body and weep aloud. If the *eldest son* of the deceased has previously died, his *eldest son*, if he has one, takes his place. In case he has no son living, some one who has been *adopted as the eldest son* performs the ceremony. The second or the third son, or any of their children, never performs this ceremony unless adopted as the heir and representative of the *eldest son*. Sometimes, in wealthy families, a professor of ceremonies is employed to direct the eldest son in the discharge of his duties on this occasion according to established rules. The eldest son at this time wears a cap, with his clothing properly arranged, and having shoes on his feet; but previously he has appeared with dishevelled hair, and with disengaged clothing. The members of the family then burn a miniature sedan chair (provided with paper diminutive bearers) for the use of the dead, as it is believed that he would enjoy riding instead of being obliged to walk, to the infernal regions. They then put the "Longevity" clothes on the corpse. It is an established custom that, if three garments are put upon the lower part

prior birth, though he may have numerous brothers, some or all of whom are more talented and more intelligent than he.

On the death of his parents, the furnace or cooking-range and cooking utensils which they used invariably fall to him.

of the person, five garments must be put upon the upper part. The rule is that there must be two more upon the upper than upon the lower part of the corpse. After the grave clothes have been placed on the body, it is bound round tightly with several pieces of cloth usually two of which are white and one is red. The white cloth comes next to the clothing. Some or all of it is torn up into strips, and, after being wound round the corpse in a certain manner, is tied into a kind of knot, which is considered auspicious or an omen of good. The body is all covered with these auspicious knots. Over the white cloth, or the white silk, if the family can afford it, is put the red cloth, similarly torn into strips, and knotted. The two ends of the red cloth or the red silk are usually cut off, one piece being given to the eldest son, which he divides among his brothers. The other is sometimes given to the sons-in-law of the dead, each having a little piece. The family members then place the dead body in the coffin. The *eldest son* carries the head of the corpse, and his brothers or other family relations aid him in placing the body into the receptacle provided. They put a table before the place for the spirit. Soon after the lid of the coffin has been nailed down, the children of the deceased produce and arrange in the reception room of the house a chair, a table and a bamboo or a wooden frame. Sometimes this frame is covered over with white paper or white cloth, and the longevity picture is hung upon it so that one, on entering the room can see it readily. The longevity picture is intended to be a likeness of the person whose death is mourned. On the table is placed a bowl containing incense, which is kept burning for forty-nine days and nights. The table, chair, frame and the picture remain unmoved until the expiration of 49, 60 or 100 days as the family decides. As the Chinese believe that the dead cannot find their way safely to the infernal regions, they make provision for the wants of the "little devil" or guide, supposed to be furnished by the King of Hades (spoken of by the Chinese as the "devil who follows"), by placing on a corner of the table, before the "longevity picture," a chopstick and a small bowl for his use during his journey with the deceased to the Land of Shades. After

His brothers, on no account, may obtain and use them as their own.

It falls to the duty and the privilege of the eldest son to receive, preserve and worship the ancestral tablets belonging

the ceremonies are over, they bring and place on the table three plates of food. The *eldest son* then approaches, and kneeling reverently down before the table, makes three solemn bows toward the ground, all the time wailing aloud. All his brothers and other relatives follow him and show their respect similarly to the soul of the dead, or to one of its three souls, as the Chinese believe. The *eldest son* and others then commence the observance of sleeping by the side of the coffin at night, and they continue doing so until the coffin is taken away. During this period, both at day and night, they burn a kind of incense, called, "dry incense" consisting of a straight, small stick. The straight stick is symbolical of a straight road, because a straight road is much less likely to be lost by the spirit of the dead than a crooked road. The incense must not go out in any case, but if it does, the main responsibility is the *eldest son's*. The eldest son must not absent himself from the coffin at night, unless too ill to perform his duties and trim the lights. They bring hot water in the morning, rice at meal times, and bid him good night on going to bed.

Quite a number of other ceremonies follow until the body is finally cremated, and in all these ceremonies, be it noted, the *eldest son* has an absolutely essential and important part to play, and he has many peculiar rights to exercise and obligations to perform. But we shall leave all these details and discuss one or two more important points.

After the ceremonies at the grave are over, the tablet which has been provided to represent the buried dead is placed in the front of the head store, or of the place where that is to stand. All the members of the family who have been to the graveside as mourners, including the *eldest son*, kneel down before the tablet reverentially. The eldest son then sings a hymn, which means: "Let the bones and the flesh return to the earth, and the spirit enter the tablet." The tablet is then carried home in a procession. From this time onwards it is looked upon as a sacred object—a valuable treasure—and the utmost care is taken for its safe preservation.

As soon as the tablet is brought inside the home, it is "dotted" and

to his father's family, and to erect and worship tablets in memory of his father and mother after their death. None of his younger brothers may erect a tablet representing only their father or their mother. They may each erect a general tablet,

then it is placed among the other ancestral tablets of the family. If the family is rich enough to utilise the services of a mandarin or a religious professor, a mandarin is employed. He dots the tablet, while the eldest son devoutly kneels down before him. After the "dotting" ceremony is over, the mandarin returns the tablet to the *eldest son*. The eldest son then takes it to the niche where the other ancestral tablets are, and carefully places it there, the cymbals ringing solemnly all the time. The tablet, thus placed on the niche, represents the dead for three or five generations.

Doolittle gives these two accounts of the origin of the ancestral tablet :—

"According to one account, it originated during the Chau dynasty (B.C. 350). An attendant on the Prince of Tsim cut off a piece of flesh from his thigh and had it cooked for his master, who was perishing from hunger. He was unable to continue to travel on account of pain. He was afterwards burnt to death in a wood which had been set on fire. His prince found his corpse, and erected a tablet to his memory and offered incense before it daily."

"The other account is derived from one of twenty-four stories relating to filial piety. Some time during the Han dynasty which ended about 25 A.D., lived Ting Sean, who, having lost his parents when he was young, never was able to obey and support them; while thinking of their toils and troubles on his account he carved images of them and served them as though they were alive. His wife would not reverence them. One day she took a needle and in sport pricked their fingers when blood ran out. Sean afterwards on looking at the images, observed their eyes filled with tears. Inquiring of his wife, he learned the circumstances of the case, and immediately divorced her."

Opinion varies as to the original appearance of the ancestral tablet. It is generally believed that formerly it resembled a human form, but now-a-days it does not in any way resemble a human form. The kind of ancestral tablet that is found in one province is not necessarily like

representing not only their departed parents, but all their family ancestors back to the third or the fifth generation, on their father's side and on their mother's side. The eldest brother does not erect this kind of ancestral tablet. He may only

that to be found in another province. The best tablets are made of fragrant wood.

The tablets we have so far spoken of are tablets in private houses. But there are also public halls—ancestral halls—where the representatives of a family clan meet together several times a year. The tablets in these ancestral halls and the tablets commemorating ancient sages are much larger than those used in private houses. (The tablet represents only one deceased individual.) The tablet for the father and the tablet for the mother of a family resemble one another in many respects although generally the tablet for the father is larger in size than that for the mother. Only one tablet is allowed to be erected in honour of one's father or mother. This belongs to the eldest son and is usually kept in his house. All the ancestral tablets which belong to the father and mother of a family descend to the eldest son and become his property on their death. When the eldest son dies, they descend to his son, if he has any; when the eldest son is of adult age and married and has no son, the general custom is for him to adopt a child of one of his younger brothers or of some other relation in order to keep up the family name and retain the tablets in his own family line.

Daughters are not allowed a tablet of either parent. After daughters are married they worship the tablets belonging to their husband's family. On their death, their tablet is placed among the tablets which belong to their eldest sons, and not among those which are worshipped in their brothers' families.

As long as the sons of a family continue to live together, they worship the tablet which has been erected by the *eldest son*. When the family disintegrates, and the younger sons, receiving their share of the patrimony, set up separate establishments for themselves, they can, each of them, erect an ancestral tablet which is in many respects different from the tablet erected by the eldest son. A tablet erected by a younger son may represent all the ancestors of the family of a certain surname. The same tablet may contain the names of both the male and female ancestors. This may be a tablet—and often is—a

erect a tablet in memory of his father, and another of his mother, after their decease. The ancestral tablets which belonged to his father all come into his possession as a precious heir-loom.

general tablet for all his ancestors in common. On his death this tablet descends to his eldest son, who has the exclusive right to erect the other kind of tablet to the memory of his father and mother, while his younger sons may each erect the general tablet to the memory of their father and mother and of their more remote ancestors.

The ancestral tablet representing the father or the mother of a family is worshipped at fixed times for three or five generations. Then they are either buried or burnt to ashes.

There are two kinds of ancestral halls—those in which all the ancestors of families having the same ancestral name and claiming relationship are worshipped, and those in which the ancestors of a particular branch of the families having the ancestral name and claiming near relationship are worshipped. These latter are called “branch” ancestral halls.

In regard to the proceedings in an ancestral hall, Dr. Doolittle, citing an actual instance, says : “a professor of ceremonies was present directing the worshippers when to kneel, bow and rise up. Their faces were turned towards the tablets. The head person among them was a lad some six or eight years old, being the *eldest son of the eldest son*, etc., of the remote male ancestors from whom all of the Chinese having his ancestral name, living in this city, claim to have descended. He was the chief of the clan according to the Chinese law of Primogeniture. This lad had the precedence in offering every object of worship (cups of wine, etc.). The lad, instructed by the professor of ceremonies, took the lead in the worship.

It is very difficult for a Chinese who is in Government service to resign office, but he can resign on the death of his father or mother or he can ask permission to resign office or remain with his parents until they die.

“Not unfrequently does it occur that one who is appointed to office is duty bound to offer his resignation because some member of his family or some relative or very intimate friend, has an appointment in the same province of inferior rank to his own. The general rule is

In the division of his father's property among the sons the eldest son has more than any one of the others. The married daughters are generally left out of account in the division of the property, as they are no longer reckoned members of their father's family. They have already received their dowry at the time of their marriage. The unmarried girls, whether betrothed or not, have usually a small sum of money, or a part of the property, allotted for their dowry when married or designed to help them to defray the expenses of their marriage festivities.

Eldest son's special portions at partition.

that the more honourable in family relations may not be in office of a lower rank under one less honourable. A greater must not worship the less ; and equals must not be placed in official positions so that one must worship the other as higher or lower and friends must not 'worship' each other. Such a relation of things would be contrary to the order of nature." One's family rank is a thing to be counted on, and the lower in family cannot occupy a superior position in public office.

A son may not enjoy the title of a high rank and honour without at first securing a title of a higher rank and honour for his paternal ancestors. According to law, a dutiful son must ask the emperor to confer upon his father a title of rank one degree higher than his own. The mother also receives a proper and corresponding title. Whether living or dead a parent must be honoured if his son is honoured.

There are other ways in which the Chinese give proofs of filial piety, of which the eating of a filial porridge is one. The legend of filial porridge is that a woman broke her vow that she would not re-marry after her husband's death. She was consequently consigned by the gods to hell, and there she stayed. Her son was very distressed over this, and he contrived to carry cooked food to his mother. The devils, however, ate up everything before he could reach his mother. So he cooked very dirty-looking porridge which even the devils would not touch, and he safely carried it to his mother. The present-day custom is to place before ancestral tablets plates containing dirty foodstuff, called "filial porridge." The Chinese believe that they thus give succour to their ancestors.

The general rule for dividing the balance of the patrimony, after deducting the outfit or dowry of unmarried daughters, is said to be to count the portion of the eldest son as two, and the portion of each of his brothers as one. If there are four sons, the property is divided into five shares of equal value, of which each of his younger brothers has one share, while he takes two. It falls to his lot to support his mother, if she survives the division of the family property, and to burn incense, candles, and mock-money at the established times, and to make the customary offering before the ancestral tablets of the family. The homestead falls to his portion of the inherited property, if there be a homestead.

In some cases, the proportion of property, which falls to the eldest son is less than the proportion above indicated. He always receives more than any one of his younger brothers, though sometimes not twice as much. Sometimes his proportion is as one and a half to one, instead of two to one. Should there be only four brothers in all, the eldest would have at the rate of one hundred and fifty dollars for each of the others receiving one hundred dollars.

The eldest son is the representative head of the family after the death of his father. On festive and mournful occasions, as at marriages and funerals, he is the chief or head. He acts as the high priest, *the pontifex maximus*, of the families of the male children of his deceased father on all occasions when sacrifices of any kind are to be offered to the manes of ancestors, whether in his own house or in the ancestral hall. He represents the family on all representative occasions.

The division of the family property is oftentimes made while the parents are still living, especially if of considerable amount. If the division is deferred until after the death of the father experience shows that it is almost invariably accompanied with much hard feeling and quarrelling, and sometimes more or less fighting among the children, or between them and their paternal uncles, who by custom or by law, are a kind of

executors or administrators of the estate. Usually the living father has so much authority over his sons that they submit to his decisions, if made known and carried out during his lifetime, relating to the division and the disposal of the property to be inherited by them.

• If the number of children is small, and there is but little property to inherit, it very frequently occurs that there is no such formal division of the property, either before or after the decease of their father, and the families continue to live together for several generations. In large families, this is seldom practicable or desirable especially if the patrimony is extensive and valuable, provided those concerned are able to agree in regard to its division—especially if living in a large city. In the country, where the property consists principally of land, farming utensils, and cattle, there are very numerous instances where whole villages are composed of relatives, all having the ancestral surname. In many cases, for a long period of time no division of inherited property is made in rural districts, the descendants of a common ancestor living or working together, enjoying and sharing the profits of their labours under the general direction and supervision of the head of the clan and the head of the family branches. The Chinese have been distinguished from immemorial ages for the harmony which prevails among brothers, cousins, and more remote relatives from generation to generation, which have common interests and a common surname. Each family generally cooks its food and eats it separately, and has its own private apartments, no matter how many families live in the same compound or under the same roof.

In case of the death of the eldest son, his eldest son on representative occasions must represent the family; when cards of invitation are issued, they are issued in the name of the eldest son of his father, no matter how young the former is or how momentous and important the interest involved be even when relating to the families of his paternal uncles, or the cousins on his father's side, etc. It is an invariable principle

of usage and law that the rights, duties, and privileges of primogeniture are to be confined to the family of the eldest son and his descendants from generation to generation.

In case the eldest son dies before marriage, or after marriage without male children, it is the custom to adopt some person as his child and heir who shall assume his rights and privileges and act as his representative. The children of the adopted heir sustain the same relation to the brothers, uncles and nephews of their adopted father as though they were the lineal descendants of the childless man. It is regarded as indispensable that there should be some one to burn incense to the manes of the dead from the eldest son down to posterity in the direct line of the eldest son, either by an own child or an adopted child.

The person who is adopted as the heir of the eldest son is most usually a relative, as his nephew or his cousin. At the time of adoption, a feast is prepared, to which the eldest son, if living, invites his relatives of higher rank than himself, his younger brother, and in general, the heads of the various branches of the family. If the eldest son is already deceased, the business is taken in hand by the one whose duty it is to see an heir provided to inherit the name and to discharge the duties of the dead. The contract of adoption is usually made out on the occasion of the feast, and signed by the representative parties, who attend as witnesses. The document states the name of the person adopted and the name of the adopter, who agrees to adopt and regard the former as his legal son and heir, whether he in future answers his expectations and conforms to his wishes or not. The principal parties to this contract burn incense before the ancestral tablets of the family and worship them. The adopted son worships them as representing his ancestors, and calls himself thereafter their descendant. The ancestors are supposed to be present as partakers of the homage paid, and as witnesses of the transaction.

There may be one head of the clan. Under him there are several heads of families. The latter are the eldest sons of the different branches of the same clan. Their number corresponds to the number of the different branches. The head of the clan has control of all the heads of families in cases of quarrels or criminal acts. If the latter, who may be styled the patriarchs, are not able to settle the quarrels or knotty questions which arise among those subject directly to them, they are entitled to call upon the archpatriarch, as the chief of the clan may be styled, for his advice and decision, and the exercise of his influence, which is very great. Magistrates often call upon the head of families for information about those under them in criminal cases. They and the archpatriarch are held, in a Chinese sense, responsible for the good behaviour of those whose interests they represent, being connected with them by the ties of consanguinity and being by the laws of the empire and usages of society, their chiefs and heads.

It sometimes occurs that branches of some families run entirely out. It comes to pass that no children are born to the last descendant, and, in consequence of the want of a patrimony to inherit, it seems best by the remotely-related branches not to have any heir adopted to inherit the family name and ancestral tablets when there is no property to go with the name and the tablet. In such cases, when the last lineal or adopted descendant dies, and there is no one left to burn incense before his ancestral tablets, they are taken and deposited on a certain altar, which is generally found connected with the village or the temple in the neighbourhood. The altar referred to is provided for the express purpose of holding the tablets of families which have become extinct. It is sometimes called the no-offspring altar, and sometimes the no-offering altar. None of the other branches of the family care about keeping these tablets and worshipping them according to custom; for they are not the tablets of their direct ancestors, but only of their distant relatives. This running out of families is one which is regarded

as exceedingly undesirable, and one which every family is extremely anxious to prevent. It is to the Chinese a very painful thought that hereafter there may be no descendant who will feel it his duty and privilege to burn incense before their ancestral tablets. Such a result is believed to be a sure proof of the curse of the Gods. Sometimes the tablets of ancestors older than three or five generations are placed on the altar referred to.

We now come to Japan. The oldest book of Japanese history which has come down to us is called *Kojiki* Japan. or *Records of Ancient Matters*. This work was undertaken by the direction of the Emperor Temmu (A.D. 673-686), who became impressed with the necessity of collecting the ancient traditions which were still extant, and preserving them in a permanent record. Before the work was ended the Emperor died, and for twenty-five years the collected traditions were preserved in the memory of Hiyeda-no-arc. At the end of that time the Emperor Gemmyo superintended its completion, and it was finally presented to the Court in A.D. 711. By a comparison of this work with the *Nihongi* or *Chronicles of Japan*, which was completed in A.D. 720, only nine years after the other, we find that the two are almost equally ancient and supplement and explain each other. Besides these two historical works, there is another ancient book of great authority—Yengishiki (Code of Ceremonial Law).

Our knowledge of all events in the earlier history of Japan, indeed of all preceding the ninth century, must be derived from tradition and cannot claim the same certainty as when based on contemporaneous documents. Not only the whole of the so-called divine age, but the reign of the emperors from Jimmu to Richu, must be treated as belonging to the traditional period of Japanese history, and must be sifted and weighed by the process of reason. Many historical facts are so mixed up with mythological legends in the Japanese traditions that it is very difficult to distinguish truth from fiction. Nevertheless it

must be admitted that much of the myth of Japan is history, and we must depend on it if we have to come to conclusions about the early family laws of Japan.

The Island of Japan, or the groups of islands which together are called Japan, are said to be the production of the joint labours of—or rather the offspring of—deities called Izanagi and Izanami (the male-who-invites and the female-who-invites). Before long Izanami died and departed into Hades. Izanagi followed her but finding that his spouse was in a loathsome condition he came back to the upper regions. Intending to purify himself from the pollution of Hades he came to a small stream to have a bath; as he washed the different limits of his body, many deities were born, chief among whom were: (1) Heanan-Shining-Great-August-Diety, or, as she is often called the Sun-Goddess, (2) His-Augustness-Moon-Night-Possessor, and (3) His-Brave-Swift-Impetuous-Male-Augustness. Izanagi took from his neck his august necklace and gave it to the Sun-Goddess, saying, rule thou in the plains of high heaven. Then he gave the dominion of the night to the Moon-Night-Possessor, and the command of the plain of the sea to His-Impetuous-Male-Augustness. From this little story it is apparent that even in the mythological era a female was not debarred from holding suzerainty over a vast domain like “the high heaven” if she had the ability to exercise it. Our Sun-Goddess must have got the superior position as the empress of heaven by virtue of her intellectual prowess.

Many mythological princes are stated to have reigned before the first Emperor Jimmu. The history of the Mythological period shows that there was no fundamental law of succession to the throne of the emperor even in those pre-historic times. Jimmu is said to be the first Emperor of Japan. The accession of the Emperor Jimmu is fixed at 660 B.C. He is said to have died at the age of 137. The Emperor Jimmu was succeeded by his third son, known by his canonical name as the Emperor Suizei.

Royal succession in
Mythological period.

The reigning emperor, it seems, very often selected the son who should succeed him. This was not always the eldest son, but from the time he was chosen he was known as *taishi*, which is nearly equivalent to the English term Crown Prince.

The Emperor Suizei was, as we have seen, the third son of Jimmu and reigned for thirty-two years, dying at the age of eighty-four. The third emperor was Annei, the only son of Emperor Suizei. He reigned for thirty-seven years and died at the age of fifty-seven. The fourth emperor was Itoku, the eldest son of the Emperor Annei. He reigned for thirty-three years and died at the age of seventy-seven. The fifth emperor was Kōshō, the eldest son of the Emperor Itoku. He reigned for eighty-two years and died at the age of one hundred and fourteen years. The sixth emperor was Koan, the eldest son of the Emperor Kōshō. He reigned for one hundred and one years and died at the age of one hundred and thirty-seven. The seventh emperor was Korei, the second son of the Emperor Koan. He reigned for seventy-five years and died at the age of one hundred and twenty-five. The eighth emperor was Kogen, the eldest son of the Emperor Korei. He reigned for fifty-six years and died at the age of one hundred and sixteen. The ninth emperor was Kaikwa, a younger son of the Emperor Kogen. He reigned for fifty-nine years and died at the age of one hundred and eleven. The tenth emperor was Sujin, a younger son of Emperor Kaikwa. He was succeeded by his younger son who is known as the eleventh emperor under the name of Suinin.¹ The Emperor Suinin was succeeded by his

¹ 'The story of the Emperor Suinin and his wife is a tragic one. A brother of the empress was ambitious of attaining supreme authority. He put this question to his sister: "who is dearer to thee, thine elder brother or thy husband?" She replied, "My elder brother is dearer." Then he said: "If I be truly dearer to thee, let me and thee rule the empire." And he gave her a dagger and said to her: "Slay the emperor with this in his sleep." And the empress watched the opportunity to assassinate her own husband. But one night, conscience-stricken, she

younger son Keiko who became the twelfth emperor. The successor to the Emperor Keiko was known by the canonical name of Seimu. He was the thirteenth emperor, and was grandson of his predecessor having been a son of the hero Yamatodake who was the Crown Prince until his death.

The successor of Emperor Seimu, the fourteenth emperor, was Chūai, his eldest son. Chūai died after reigning for only eight years, and he was succeeded by his energetic wife, Jingo-Kongo, who is still remembered for her successful invasion of

divulged the nefarious plan of her brother to the emperor, who, immediately collected his troops and marched against his brother-in-law. He had anticipated this and entrusted himself behind palisades of timber. The empress, stricken with terror, deserted to her brother's palace. At this juncture she gave birth to a child. She brought the child to the palisades and cried out to the emperor to take it under his care. The emperor's heart was moved, and he ordered a band of brave soldiers to rescue both the child and its mother. She however, fearing that the soldiers would drag her to the emperor by force, shaved off her hair and covered her head with the loose hair as if it were still adhering. "And she made the jewel strings around her neck and arms rotten, and she rendered her garments, by which they might catch hold of her, tender by soaking them in *sake*. When the soldiers came to her she gave them the child and fled. Then they seized her by her hair and it came away in their hands; and they clutched at the jewel strings and they broke; and then they grasped her garments, but they had been rendered and gave way in their hands. So she escaped from them and fled. Then they went back to the emperor and reported that they had been unable to capture the mother, but they have brought the babe. The emperor was angry at what the soldiers told him. He was angry at the jewellers who had made the rotten jewel-strings and deprived them of their lands." The story indicated that all the land in the empire belonged to the emperor. He was the virtual owner of every strip of land in his territory, although his subjects might be in possession of particular plots of land. The emperor was not only the administrator but the proprietor of all the land in the empire.

Suinin slew his brother-in-law and set fire to his palace. The empress perished in the fire.

Korea. She reigned as empress-regent for sixty-eight years, and was succeeded by her son, Ojin, who became the fifteenth emperor. He began his reign in 270 A.D., and reigned for forty years. He had three sons, and wished the youngest one to succeed him; but the youngest son would not like to be emperor and committed suicide. So the second son, who later was known as the Emperor Nintokei, ascended the throne. He reigned from 313 A.D. to 399 A.D.

Now the emperors so far mentioned belonged to what we may call the legendary period of Japanese history. But the review of this period is valuable in so far as it shows that there were no fixed rules of succession in early Japan, and that younger sons of emperors often succeeded their fathers in preference to the elder ones. No law of primogeniture was known to the Japanese in those early times. We have seen that administrative authority more than once vested in females. The powers of the empress-regent, when such a one reigned, were exactly those of an emperor. So far about mythological Japan and her mythological princes.

From a perusal of Mr. Basil Hall Chamberlain's translation of the Kojiki, we can come to the following conclusions with reference to the form of Government in early Japan: "The Government was of a tribal order. The emperor was the chieftain of an expedition which came from the island of Kyushu and established a government by conquest. The chiefs of the various localities were reduced to subjection and became tributary to the emperor, or were replaced by new chiefs appointed by the emperor. The Government was therefore essentially feudal in its characteristics. The emperor depended for the consideration of his plans and for their execution upon officers who were attached to his court. There were guilds composed of the manufacturers of various articles and to each of these there was a captain who became by appointment hereditary chief. We have no mention of money for the payment of services rendered. The taxes were

probably paid in kind." From what has been stated above it can be safely inferred that the origin of feudalism in Japan was in the mythological period of her history.

Feudalism in Japan.

Royal succession in the middle ages of Japan.

We now come to a point in Japanese history, where we can move on safer ground. We shall mention one or two emperors of what we call the middle ages of Japan, in order to show that even then there were no rules of succession to the Imperial throne. The nineteenth emperor was Inkyo, the fourth son of the Emperor Nintoku. The twentieth emperor was Nintoku's younger son, Auko. Auko was slain by his wife's son by her first husband, and Ōhatuse, the son of a member of the Imperial family who was banished, and was working as cowherd in the interior, became the twenty-first emperor. We pass over a long period without recording any change in the manner in which the right of succession was determined. The thirty-third sovereign was the Empress Suiko, who was the sister of the Emperor Yomei, and whose reign began in 593 A.D.

The constitution of Japan has been that of absolute monarchy during the greater part of her chequered history. The Emperor held in his hands the supreme authority, and he had the power to distribute honours and emoluments as he pleased. He disposed of high offices and administrative duties according to his pleasure. "There was no fundamental law of succession by which the order of accession to the throne was regulated. The reigning emperor usually selected during his life-time some one of his sons, or, if he had no sons, some other prince of the Imperial family, who became the crown prince during the life of the emperor, and on his death succeeded to the throne."¹ The emperor usually consulted the officers of his court in the matter of the selection of his successor, and very often it was really these officers who appointed the emperor's

¹ Mori Arinori's introduction to "Education in Japan," p. 17.

successor, and the emperor had only to give his ascent to the selection. Sometimes the emperor died before the selection of his successor. In cases like this the selection of the next emperor lay entirely in the hand of the court officers.

Dr. David Murray, in his book, "The Story of Japan," writes: "To the freedom which has prevailed, not only in the imperial house but also in all the families of the empire, in regard to the rights of succession, must be attributed the long and unbroken line which the imperial house of Japan is able to show. That a line of sovereigns should continue from the time of Jimmu down to the present without break by reason of the failure of children, is of course, impossible. But the difficulty disappears when it is remembered that in case of the failure of a son to succeed, the father provided for the want by adopting as his son some prince of the imperial family, and appointing him as his heir. With this principle of adoption must be mentioned the practice of abdication which produced a marked and constantly recurring influence in the history of Japan. Especially was this the case in the middle ages of Japanese history. The practice spread from the imperial house downwards into all departments of Japanese life. Although the principle of abdication and adoption was probably brought from China and was adopted by the Japanese as a mark of superior culture, yet those practices were carried to a much greater extent in Japan than was ever thought of in their original home.... We shall witness even the great and sagacious Ieyasu himself, after holding the office of *Shogun* for only two years, retiring in favour of his son Hidetada, and yet from his retirement practically exercising the authority of the office for many years."¹

During the reign of the Emperor Tenji who ascended the throne in 668 A.D., the famous Fujiwara family figured prominently in the public eye for the first time. The emperor

¹ Story of Japan, pp. 118, 119.

appointed his counsellor Nakatomi-no-kamatari as *nai-daij-in* (private minister), an office next in rank after *Sa-daij-in*, and which was created at this time. The emperor authorised Nakatomi to assume the family name of Fujiwara. The Japanese state that the ancestor of this family, Naketomi-no-Muraji came down from the celestial plains to the island of Kyushu. The family ranks with the imperial family as the oldest and most honoured in the empire. Umako had held the position of *daij-in* and his son Yemishi became *daij-in* after his father's death (in the latter part of the sixth century A.D.). Since then the office became almost hereditary and after Yemishi's death his son Iruka succeeded him as *daij-in* almost as a matter of right.

For many centuries the relation of the Fujiwara family to the imperial family was so intimate that the late Viscount Mori in his "Education in Japan" speaks of this relation as a "proprietorship." "The throne for a time became virtually the property of one family, who exclusively controlled it." The founder of this house, Kamatari, was a man of great talents and his immediate successors also were men of ability, and so in succession they filled the office of *daij-in*. The office of *Kuambaku* also, from about 880 A.D., became hereditary in the Fujiwara house. Through centuries it was a common practice to marry ladies of the Fujiwara family into the imperial family, and the offices of the court were in the hands of this family. In this condition of things, the abdication of emperors before they had reigned long enough became a thing of very frequent occurrence. For instance, Emperor Seiwa (A.D. 859-880) abdicated at the age of 26. Shujaku (A.D. 931-952) abdicated at the age of 23. But in most cases the object of abdication was two-fold: (1) the emperors wanted to free themselves from the restraints of etiquette associated with the office of emperor; (2) they assumed the dignity of retired emperors, and often from their retirement wielded a greater influence and exerted a far more active part in the administration of affairs.

In order thoroughly to understand feudalism in Japan we now come to the time of Ieyasu, the famous *Shogun* (Commander-in-chief of the Japanese army during the continuance of the feudal system in Japan), who after the decisive battle of Sekigahara in 1600 A.D., assumed full control of the empire in his own hands. He was a great general and statesman and was appointed *Shogun* in 1603. He abdicated in 1605 in favour of his son Hidetada and retired to the castle of Yedo. From here he directed the affairs of the state, although theoretically his son was the *Shogun*. Ieyasu directed his attention and energies more to the consolidating and settling of the feudal system of the empire than to anything else. The Daimyos (territorial nobles of Japan under the old feudal system), had for centuries governed their own provinces independently, and Ieyasu made terms with all of them, and those who fought against him in the battle of Sekigahara became his friends.

Ieyasu's object was to establish a system which should continue loyal to his successors, and a line of successors who should be of his own family. "Hence out of the confiscated territories, and out of those which were in part vacated as a fine on the former holders, and out of those which had become vacant by natural causes, he carved many fiefs with which he endowed members of his own family and those retainers who were closely affiliated with him."

Ieyasu had nine sons and three daughters. He married his daughters to three Daimyos. His eldest son had died at an early age. His second son, Hideyasu, had been adopted by Taikogama, and Ieyasu gave to him the province of Echizen as his fief. He nominated his third son, Hidetada, to succeed him as *Shogun*. He bestowed the province of Owari, Kii and Mito on his youngest three sons, and constituted the families to which they gave rise as the Go-san-ki, or the three honourable families. In case of failure of the direct line, the heir to the *shogunate* was to be chosen from one of these families.

Feudalism existed in Japan long before the time of Ieyasu. Dr. Murray says that "it can be traced to the period when Yoritomo (who was *Shogun*, 1192-1199) obtained from the emperor permission to send into each province a *Shingo* who should be a military man, and should act as protector of the *Kokushu* or governor, who was always a civilian appointed by the emperor. These military protectors were provided with troops, for the pay of whom Yoritomo got permission from the emperor to levy a tax. Being active men, and having troops under their command they gradually absorbed the entire authority, and probably in most cases displaced the *Kokushu*, who only represented the powerless government at *Kyoto*. Under the disturbed times which followed the fall of the house of Yoritomo these *Shingos* became the hereditary military governors of the provinces and usurped not only the functions but the name of *Kokushu*. They became a class of feudal barons who, during the interval when no central authority controlled them, governed each one his own province on his own responsibility."

Before Ieyasu's time there were three classes of daimyos: 18 *Kokushō*, or provincial governors, 32 *ryoshū* or lords of smaller districts; and 212 *joshū* or lords of castles.

Ieyasu divided all daimyos into two distinct classes: *fudai* and the *tozama*. The term *fudai* applied to those who were considered the vassals of the Tokugawa family (i.e., the family to which Ieyasu belonged). The term *tozama* applied to those daimyos who are equal in position to the vassals of the Tokugawa family, but not actual vassals.

Besides these *daimyos*, Ieyasu established a third and inferior kind of feudal nobility, the *hatamoto*. This means literally *under the flag*. They had small holdings and they were employed as port officials. Other inferior orders of nobles were *gokenin* and *shamusai*.

For the consolidation of the empire, for efficient administration and with a view to getting prompt and voluntary services from the feudal lords in times of necessity, Ieyasu made it

a law that all feudal states were impartible. The breaking up of the empire at times of war or other disorders was thus prevented. Under feudalism the people were divided into four classes in the following order: *shamurai*, farmers, artisans and merchants. Ieyasu in his famous legacy thus prescribed: "The *Shamurai* are the masters of the four classes. Farmers, artisans, and merchants may not behave in a rude manner towards the *shamurai*... and a *shamurai* is not to be interfered with in cutting down a fellow who has behaved to him in a manner other than is expected."

The relations between the feudal lords and their retainers were based on the doctrine of Confucius. The principles laid down by him fitted in with the ideas of the Japanese in regard to feudalism. "They inculcated absolute submission of the son to the father, of the wife to her husband, and of the servant to his master, and in these respects Japanese feudalism was a willing and zealous disciple. On these lines Ieyasu constructed his plans of government, and his successors enthusiastically followed in his footsteps.

In the latter part of the 19th Century a most remarkable event occurred in the history of Japan. Old feudalism came to an end and the daimyos voluntarily surrendered their feudal rights. This action, says Dr. Murray, was a logical consequence of the restoration of the executive power into the hands of the emperor. It was felt by the statesmen of this period that in order to secure a government which could grapple successfully with the many questions which would press upon it, there must be a centralisation of the powers which were now distributed among the powerful daimyos of the empire.

As soon as the most powerful of the daimyos surrendered their fiefs, others followed their example immediately, and 241 daimyos sent a memorial to the emperor asking him to take back their hereditary fiefs. The emperor, by a royal decree on August 7, 1869, announced the abolition of the

daimites and the restoration of their revenues to the imperial treasury.

Feudalism originated, developed and decayed. But it is difficult to say how far this feudalism had any hand in moulding the shape of primogeniture in Japan.¹

Yet indication of primogeniture is not rare in Japan. The Civil Code of Japan while making provisions for succession to the headship of the family enacts as follows²:—

“The lineal descendants of the person succeeded to who are members of his family succeed to the headship of the family in accordance with the following provisions:—

(i) As between persons in different degrees of relationship, the nearest relative is preferred.

(ii) As between persons in the same degree of relationship, the male is preferred.

(iii) As between males or females in the same degree of relationship, a legitimate child is preferred.

(iv) As between a legitimate child, a sho-shi and illegitimate child who are in the same degree of relationship, the legitimate child and the sho-shi, even if females, come before an illegitimate child.

(v) As between persons who stand in the same position in respect of the points mentioned in the preceding four sub-headings, *the senior in age* is preferred.”

Primogeniture.

The heir to the headship of a family, according to this Code, inherits from the date of the commencement of the succession the rights and duties possessed by the previous head of the family.³ “The ownership of the records of the family

¹ See Gubbins' Civil Code of Japan, Introduction, p. iv.

² The Civil Code of Japan (Gubbings), Part II, Art. 970.

As regards the origin and significance of Japanese family, see Gubbins' Civil Code of Japan, Introduction, pp. iv to xxx.

³ *Ibid*, Art. 986.

genealogy, of the utensils and furniture of worship, and of the family tombs, belongs to the special rights of succession to the headship of a family.”¹ In cases of succession to other properties however the code does not recognize primogenitary rules. In that case “the lineal descendants of the person succeeded to succeed to his property in conformity with the following provisions :—

(i) As between persons in different degrees of relationship, the nearest is preferred.

(ii) Persons in the same degree of relationship rank together.”²

¹ *Ibid*, Art. 987.

² *Ibid*, Art. 994.

CHAPTER VI

THE HISTORY OF PRIMOGENITURE IN INDIA

In the Vedic Age and in Post-Vedic Times.

Professor Vinogradoff¹ views primogeniture as the effect of the necessity of keeping up organic units of an economic nature, and advises us to search for its origin "in the requirements of the economic situation, which made for unity as against dispersion, and which was especially strong in primitive times when the single man was no person.² The extension of our retrospect to such an early age as the Vedic period shall seek its justification in the sayings of this great scholar. Nay, we might, if able, extend it further and might look for the germs even in the hidden pasts of the Pre-Vedic age. Unified holding would necessarily mean single succession, and Professor Vinogradoff is of opinion that it would develop primogeniture only if *authority* is the most important element of the institution. This is the case in all patriarchal arrangements, and whether or not primogeniture was preceded by any other arrangement of single succession can only get a definite solution at the hand of one who has access to the pre-historic ages preceding patriarchate. Our shortcomings however would stop us from proceeding further than the age of which we are left with some records in the Vedic literature.

¹ Outlines of Historical Jurisprudence, Vol. I, p. 286.

² *Ibid.*, p. 284.

Traces of primogeniture in these ancient days are indeed very slight. Professor Sarvādhikary no doubt reviewed certain texts of the Vedic literature and arrived at the conclusion that "Primogeniture was settled law of succession in ancient India;"¹ and Professors Macdonell and Keith would say, "as for the method of division, it is clear from the Taittirīya Saṁhitā that the elder son was usually preferred; perhaps this was always the case after death. During the father's lifetime another might be preferred, as appears from a passage of the Pañchaviṁśa Brāhmaṇa."² These learned scholars would also tell us that "the passages all negative the idea that the property of the family was legally the family property; it is clear that it was the property of the head of the house, usually the father, and that the other members of the family had only moral claims upon it which the father could ignore; though he might be coerced by his sons if they were physically stronger."

Before proceeding to examine these sayings of great scholars it would be necessary for us to have some idea of the Vedic social life, as the growth of the institution of primogeniture in the ancient world has very often been connected with the patriarchate and patria potestas, and scholars like Baden Powell have doubted the existence in early India of a *patria potestas*.³

There seems to be little scope for doubting the patrilineal and patriarchal nature of the Vedic family. The father of the Vedic literature stands for all that is good and kind, and there can be little doubt that in a family the father took precedence of the

Traces of primogeniture, very slight.

• Primogeniture, connected with the patriarchate.

Vedic family, patriarchal.

¹ T. L. L., 2nd Edition, p. 176.

² Macdonell and Keith, Vedic Index, on *Dīya*.

³ Village Communities (Baden Powell), p. 133.

mother.¹ The very name "पितृ," which from the Rigveda onwards denotes father not so much in the sense of "be-getter" as in the sense of the "protector," shows the patrilineal character of the family.² Religion, as we have already noticed, was the constituent principle of these ancient Aryan families. In every family there was an altar around which the members assembled every evening to say their prayers.³ They were united by the religion of the sacred fire and of the dead ancestors,⁴ and the worship did not belong exclusively to the male; women also had a part in it.⁵ A family generally consisted of father, mother, sons, son's wives, and children and unmarried daughters. It is indeed difficult to say how far adoption of children was recognized in these early days. No doubt in the Brahmanas we get clear indication of the prevalence of adoption, and the story of Śunahśepha as given in the Aitareya Brahmana leaves no doubt as to the recognition of the institution. But in the Rigveda itself, there are only two Riks which seem to suggest the possibility of adoption, though the Vedic Aryans seem to characterise it as an act of the foolish. We are told :⁶

परिषदां ह्यरणस्य रैक्षो नित्यस्य रायः पतयः स्वाम ।

न श्रेष्ठो अग्ने अन्धजातमस्यचेतनस्य मा पथो विदुषः ॥

न हि अभायारणः सुश्रेष्ठोऽन्योदर्यो मनसा मन्तवा उ ।

अथा विदोक्तः पुनरिक्त एत्या नो वाच्यभौषालेतु नव्यः ॥

¹ पिताजनित is used of gods in the Rigveda—IV. 17, 12. Agni is compared with a father while Indra is even dearer than a father.

Rigveda—IV. 17, 17; VIII. 86, 4; X. 7, 3. See also VII. 32, 19; VIII. 1, 6; I. 38, 1; V. 43, 7; III. 53, 2; X. 4⁸, 1; VII. 103, 3; I. 24, 1; etc., etc.

² Sat. Br. II. 5, 1, 18; Chh. Up. VII. 15, 2.

³ Rigveda, VII. 1, 2.

⁴ Rigveda, I. 68, 3; I. 66, 5; VI. 52, 4; X. 15, 1, 110; X. 40, etc., etc.

⁵ Rigveda, I. 28, 5; I. 146, 3; X. 40, 10, etc., etc.

⁶ Rigveda, VII. 4, 7; VII. 4, 8.

“The foeman’s treasure may be won with labour ;
 may we be masters of our own possessions.
 Agni, no son is he who springs from others : lengthen
 not out the pathways of the foolish.”

“Unwelcome for adoption is the stranger, one to be
 thought of as another’s offspring,
 Though grown familiar by continual presence. May
 our strong hero come, freshly triumphant.”

Sāyaṇa says while commenting on these Riks : —

अरण्यस्य रेक्ष्यो धनं परिषद्यं परिहर्तव्यं भवति अतो नित्यस्य शीरसस्य
 रायः पुत्राण्यस्य धनस्य पतयः स्वाम । ई अग्ने अन्वजातमनौरसं शेषोऽपत्यं
 नास्ति न भवति । अचेतानस्य अविदुषः पथो मार्गान् पुत्रोत्पादनप्रमुखान्
 मार्गान् मा विदुषः मा विदुषः ।

अरण्योऽरममाणोऽन्योऽर्थः सुशिवः सुखतमः सन् यभाय पुत्रत्वेन यदृषाय
 मनसा मन्तवा उ मनसापि मन्तव्यो न भवति । अश्वधित् अपि च सोऽन्योऽर्थः
 भ्रोक इत् संस्नानमेव पुनरेति प्राप्नोति ।

Wilson translates the second Rik as follows :—

Men do not look with pleasure and affection on adopted
 son : therefore let there come to us (a son) new-born, possessed
 of food, victorious over foes.

Whatever that be, the extent of father’s power in early

Extent of father’s
 power.

Vedic families had been very variously
 appraised by different scholars. Baden

Powell, as we have noticed above, doubts the
 existence of any very extensive *patria potestas*. Professors
 Macdonell and Keith say, “It is difficult to ascertain precisely
 how far the son was subject to parental control, and how
 long such control continued. Reference is made in the
 Rigveda to a father chastising his son for gambling, and
 Rijaśva is said to have been blinded by his father. From

the latter statement Zimmer infers the existence of a developed *patria potestas*; but to lay stress on this isolated and semi-mystical incident would be unwise. It is, however, quite likely that the *patria potestas* was originally strong, for we have other support for the thesis in the Roman *patria potestas*. If there is no proof that a father legally controlled his son's wedding and not much that he controlled his daughter's, the fact is in itself not improbable."¹

These learned scholars noticed the story of Rijaśva as proof of *patria potestas*. In the Rigveda we are told that his father robbed Rijaśva of his eyesight who for the she-wolf slew a hundred wethers: शतं मेषान् वृक्ये चक्षदानमृज्याम् तं पिता धं चकार.² This is the Vedic text on which the story is based, but this is only a statement as to what a father did having got annoyed with his son. The story itself nowhere suggests that the father was perfectly within his rights so to chastise his son. But when we read this along with the stories of Kaksivān, Rohita and Sunahśepha, it seems quite reasonable to guess at the existence of some sort of *patria potestas*, may not be as stringent and cruel as that of the early Romans. Kaksivān earned immense wealth but had to give it up in favour of his father: षष्टिसहस्र-मनुष्यमागात् सनत् कक्षीर्वा अभिपत्ये अङ्गान्;³ and Sunahśepha's father not only could sell him away, but seems to have been the only person competent to kill him like any beast.⁴ The story of Rohita seems however to suggest some limit to the power of the father: for we see that as soon as Rohita became capable of earning for himself, his father could not give him up to Varuṇa. But Rohita had to quit his father's place and earn for himself, and could re-enter the village only when he was able to purchase Sunahśepha

¹ Vedio Index, Pitri.

² Rigveda, I. 116, 16.

³ Rigveda, I. 126, 3.

⁴ तौ इ मयमे संपादयाचक्रतुः पुनःपिने तस्य इ वनं वत्सा इ तमादाय सोऽरुणाद वामनेवाय,
Ait. Br., 33, 8.

whom he presented to his father as his substitute. From the story of Sunahśepha and Rohita we find, no doubt, indications of father's right to alienate his son ; but the same story tells us much as to how such alienation was looked down upon by these Aryans. Natural affection and religious necessity also seem to have helped to minimize the rigours of the patriarchal absolutism.

Professor Macdonell doubts if a son, when grown up, normally continued to stay with his father, his wife becoming a member of the father's household. There seems however little reason for doubting that the normal Vedic family was joint, sons continuing to live jointly with their fathers even when married and themselves fathers of children. No doubt there are texts which might suggest that in those early days sons would take up the management of a household even during the lifetime of the fathers. But these do not necessarily mean that such households were the separate establishments set up by the sons. The same joint family continues, only the grown-up son becomes the father of the family. If any inference can be drawn from the meaning of expressions used to designate anything we cannot go far wrong in asserting the solidarity of the early Vedic family community. These Vedic Aryans call their households *Dhāma* and this word 'Dhāma' in the Rigveda is also used in the sense of Ordinance,¹ law, expressing much the same as 'Dharma' especially in conjunction with 'ऋत'—eternal order. Griffith takes it to mean 'glory' in one passage : "With all thy glories on the earth, in heaven, on mountains, in the plants, and in the waters,—with all of these, well pleased and not in anger, accept, O Royal Soma, our oblations."²

¹ See Berolzheimer, p. 97. See also Macdonell and Keith—Vedic Index.

² वाते वामानि दिवि या इषिष्या या पर्वतोवशीष्यम् ।
तेभिर्नो विष्टैः सुमना ऋषिभ्यः राजन् वीम प्रतिहन्वा यभाय ॥

The harmony, the order, the peace, the glory, all that is noble and beautiful is associated with their idea of household; and when Hillebrandt sees in the same expression the sense of Nakṣatra,¹ the brightest congregation of things, we shall perhaps not be very wrong in inferring that the Vedic household must have deserved the designation 'Dhāman.'

There is however ample indication of gradual breaking up of the joint families. We hear of division of property amongst brothers even during the lifetime of the father. The story of Nābhānediṣṭo gives us an instance of such a division. Manu is said to have divided his property among his sons. He omitted Nābhānediṣṭo who was away from home observing Brahmacharyya at the time of partition, and he afterwards was instructed by his father to appease the Angirasas and procure cattle from them. This is significant indication that the property he divided was only movable property and not land. This is how the story is given in the Taittirīya Saṁhitā.² In the Aitareya Brāhmaṇa³ the division is said to have been made during Manu's lifetime by his sons, who left nothing for Nābhānediṣṭo. According to the Jaiminiya Brahmana⁴ again, four sons divided the inheritance while their old father Abhipritarin was still alive.

It is indeed difficult to reconcile these divisions of property by sons during their father's lifetime with any developed system of *patria potestas*. Yet, as has already been noticed, the legend of Śunahśepha and similar other stories mark such powers in the father. All that can be guessed at this distant time is that this could be possible only at the decaying stage of the *patria potestas*. It might have been, as in the case of Manu's division, that at first it was the father who desired partition

¹ See Vedic Index. *See also IX. 66, 2.

² II. 5, 2, 7.

³ V. 14.

⁴ III. 156.

in order to avoid possible friction between his sons after his demise and divided the properties amongst his sons. In such a case father's desire would absolutely control the matter, and we find indications of this in a passage of the Pañchaviṃśa Brāhmaṇa.¹ Gradually however sons seem to have gained the upper hand² and this right of sons might have its germ in the weakness of some ancient father. Any developed form of *patria potestas* would make it highly improbable that sons would be legal owners with their father during father's life-time. Once they come to a partition, either through coercion or otherwise, they would be owners of their portions. It has been suggested by some scholars that after division by father has grown a recognized practice, sons, as they grew up, might come to claim such partition, and old fathers had to divide it even against their desire.³ From this gradually the idea would develop that every child on birth had a legal share in the property.

We might notice here, as an indication of the gradual breaking up of Vedic families, the secondary meaning attached to the term 'आवृत्त्य' even in the Vedic literature. The word is used in the Atharva Veda in the sense of father's brother's son.⁴ At any rate it is an expression to designate relationship of somebody who is also a member of the family with brothers and sisters.⁵ In the same Veda⁶ however we find this expression to mean a 'rival,' an 'enemy' and in this

¹ XVI. 4, 4.

² Cf. Rigveda, I. 89, 9. Cf. also Rigveda, III. 45, 4. See Rigveda, III. 49, 4. Does it signify testamentary power?

³ Cf. विद्वा वाक्वादिन विमत्तान्, Gautama Sūtra.

⁴ Whitney so translates it.

A. V., XV. 1, XV. 1, 8.

⁵ A. V., V. 22, 12; X. 3, 9.

⁶ Ath. Ved., II. 18, 1; VIII. 10, 18; X. 9, 1, etc., etc.

sense it is repeatedly used in the *Saṃhitās* and 'Brāhmaṇas.'¹

It has been noticed elsewhere that religion was the constituent principle of these Vedic families, and besides worshipping the fire, these Aryans were also given to ancestor worship. We find the Rigvedic Aryans offering oblations to all the dead ancestors without any limit to the degree of relationship. There are hymns in which these ancestors are the deities to whom the Riks are chanted and the whole household joins in it. In the Atharva Veda however we find serious modifications in this form of ancestor worship. There the worship is limited in two directions—only the ancestors in the direct line are in the list of Pitris to be worshipped, and even there the number is limited to a certain degree. We do not know whether or not this was the cause or effect of the disruption of joint families. When people believed that these dead ancestors had much to depend for their after-life subsistence upon the offerings of those who are still living here on earth, a son would naturally be more anxious to see his dead father well provided for than anybody else in the family. And we shall not be surprised if any day any scholar would establish that this gave rise to conflicts between cousins in a Vedic family which ultimately resulted not only in the breaking up of it, but also in the limitation as to the directness of line imposed on the ancestor worship. As to the other limitation, the growing belief in rebirth seems to be responsible for it.

However that be, the family was breaking up, and properties of the family were subject to division even in

¹ Tait. Saṃ., III. 5, 9, 2.

Kaṭh. Saṃ., X. 7 ; XXVII, 8.

Vājasaneyī Saṃ., X. 7.

Ait. Br., III. 7.

Śat. Br., I. 1, 1, 21.

Pañich. Saṃ., XII. 13, 2.

Cf. Rigveda, VIII. 21, 13.

these early days. The instances of division that we have noticed however all seem to relate to 'cattle,'—at least, not to landed property. And it is indeed doubtful if these early Vedic families were land-owning corporations. That the people reached the agricultural stage, there seems to be little doubt about. If in the Rigveda we find any vestiges of the pastoral age, it would be only an account of the past. In the Rigveda we meet with the word 'क्षेत्र' used in a sense to point clearly to the existence of separate fields¹ carefully measured off.² In some passages no doubt the meaning is

¹ Rigveda, X. 33, 6.

III. 41, 15.

V. 62, 7.

Rigveda, X. 33, 6—The Sire of Upamaśravas, even him whose words were passing sweet,
As a *fair field* is to its lord.

यस्य प्रस्तादसी गिर उपमश्रवसः पितुः ।

क्षेत्रं नरसूनुषे ॥

III. 31, 15—He, having found great, splendid, rich dominion,
sent life and motion to his friends and lovers.
Indra who shone together with the Heroes begat
the song, the fire, and Sun and Morning.

महिषेन प्रसन्नं विविधानादितु सखिभ्यश्च रथं समीरय ।

इन्द्रो हभिरजनहोयानः वाक् सर्वसुषसं गानुमयिम् ॥

V. 62, 7—Adorned with gold, its columns are of iron :
in heaven it glitters like a whip for horses ;
Or established on a field deep-soiled and fruitful,
so may we share the meath that loads your car-seat.

द्विरस्यनिर्धिगयो यस्य सूत्रा विधानते दिव्यवाजनीव ।

मद्रे क्षेत्रे निमितातिजिह्वे वासनेन मण्डो यन्निर्व्यस्य ॥

² Rigveda, I, 110, 5.

क्षेत्रमिव विमसुक्षे जनेन एकं पापशमयो जिह्वामम् ।

The Ribhus with a rod measured, as it were a field the
single sacrificial chalice wide of mouth.

(Griffith.)

less definite, yet indicating cultivated land.¹ The sense of 'Separate field' becomes more pronounced in the Atharva Veda² and even before that we are told of क्षेत्रपति, क्षेत्रपत्नी, क्षेत्रजेष्ठा,

¹ Rigveda, I. 100, 18—

दस्युन्विष्युष पुब्रह्म एवैहंता प्रविष्यां शर्वाणि वधोत् ॥
समत् क्षेत्रं सखिभिः शिबेभिः समत् सूर्यं समदपः सुवचः ॥

He much invoked, hath slain Dasyus and Simyus after
his wont, and laid them low with arrows,
The mighty thunderer with his fair complexioned friend
won the land, the sunlight and the water

(Griffith.)

IX. 85, 4—

सहस्रगोषः शतधारी अद्भुत इन्द्रायिन्दुः पवते काव्यं मधु ।
जयन् क्षेत्रमभ्यर्वाजयन्नप उक् नो नातुं क्वच सोमनीवः ।

IX. 91, 6—

एवापुनानी अपः स्वर्गा अक्षय्यं लोका तनयानि मूरि ।
शं नः क्षेत्रमुदज्योतीषि सोम जोङ् नः सूर्यं दृश्ये रिरोहि ॥

So purifying thee vouchsafe us waters' heavens light,
and cows, offspring and many children
Give us health, ample land, and lights, O Soma, and
grant us long to look upon sunshine;

(Griffith.)

² Ath. Veda, IV. 18, 5 ; II. 29, 3 ; XIV. 2, 7 ;

"I with this plant have ruined all malignant powers of witchery
The spell which they have laid upon thy *field*, thy cattle or
thy men."

(Griffith.)

V. 31, 4.—"The secret spell upon thy plants Amulā or Narāchi
spell

That they have cast upon *thy field*, this I strike
back again on them."

(Griffith.)

X. 1, 18.

XI. 1, 22.

Tait. Sam., II, 2, 1, 2. ; Śat. Pat. Br., I. 4, 1. 15, 16, etc.

Chh. Up., VII. 24, 2.

चेव्वावा, चेव्वजय¹ and several other expressions that would indicate property in land.

Then we have the term खिल or खिल्य meaning, according to Roth, the waste land lying between cultivated fields.² There is one term—'अभिने खिले'³ in the Rig Veda over which there has been some controversy, Roth thinking that the proper reading would be 'अखिलो भिन्नम्'—land unbroken by strips, while Pischel⁴ thinks that the meaning is broad lands which were used for the pasturing of the cattle of the community and were not broken up by cultivated fields. Oldenberg⁵ on the other hand points out that the same is rather the land which lay between cultivated fields, but which need not be deemed to be unfertile, as Roth thought.⁶ From Rig Veda onwards 'उर्वार',⁷ with 'क्षेत्र' regularly denotes a piece of ploughland, and we hear of अप्रसृतो,⁸ fertile fields, as well as fields lying waste—पारुतना⁹. Intensive cultivation by means of irrigation is clearly referred to both in the

¹ Rigveda, I. 33, 15. —

आयः अन्नं उर्वारं तुष्यासु क्षेत्रक्षेत्रे मयवन् विना गावः ।

IV. 57, 1 and 2.

VII. 35, 10.

X. 66, 13.

IV. 38, 1.

VI. 20, 1.

II. 21, 1.

² Ath. Veda, VII. 115, 4. Sat. Br. VIII. 3, 4, 1.

Rigveda VI. 28, 2 ; X. 142, 3.

³ See Macdonell and Keith, Vedic Index.

⁴ Vedische Studien, 2, 205.

⁵ Rigveda noten, I, 385, 386.

⁶ See Macdonell and Keith, Vedic Index.

⁷ Rigveda, I, 127, 6 ; IV. 41, 6 ; V. 334 ; VI. 25, 4 ; X. 50, 3 ;

X. 142, 3.

⁸ Ath. Veda, X. 6. 33 ; X. 10, 8 ; XIV. 2, 14. Rig Veda, I. 127, 6.

⁹ Rig Veda, I. 127, 4.

Rigveda and in the Atharva Veda,¹ while allusion is also made to the use of manure.²

We have already noticed a passage in the Rigveda³ which indicates the fact that fields used to be carefully measured in these days. This seems to lead us to the conclusion that some sort of ownership in these plots was recognised in these ancient days, and we are fortified in this conclusion when we hear Apālā⁴ speaking of her father's field as his personal possession, a possession placed on the same level as his own head of hair. "Consistent with this are the epithets *winning fields* (urvara-sa, urvara-jit, ksetra-sa), while 'lord of fields' used of a god is presumably a transfer of a human epithet (urvara-pati)."⁵ Fields are often spoken of in the same connection as children and the conquest of fields is often referred to in the Saṁhitās. Very probably, as suggested by Pischel, the ploughland was bounded by grass land which in all likelihood would be the joint property of the community.

In this connection we might refer to 'व्रज'⁶ which in the Rigveda denotes the place to which the cattle resort, the 'feeding ground,' the 'pasturage' to which the milk-giving animals go out⁷ in the morning from the 'ग्राम' while the other animals stay in it all day and night.⁸

There is no trace in Vedic literature of communal property in the sense of ownership by a community of any sort,⁹ nor is there any mention of communal cultivation. Besides, in one instance at least

¹ Ath. Veda, I. 6, 4; XIX. 2. Rigveda VII. 49, 2.

² Macdonell and Keith, Vedic Index.

³ Rigveda, I. 110, 5.

⁴ Rigveda, VIII. 91, 5.

⁵ Vedic Index.

⁶ Rigveda, II. 38, 8; X. 26, 3; X. 97, 10; X. 101, 8.

⁷ Rigveda, II. 38, 8.

⁸ Ait. Br., II. 18, 14.

⁹ Cf. Baden Powell, Vill. Comm.

in the Rigveda, we are told of division of lands conquered among the members of a community,¹ and are very often told of private quarrels regarding fields. All these indicate at least individual control over the land, and a sort of individual property in land seems also to be deducible later on while in the Chhândogya Upaniṣad, for example, we find in the list of a man's wealth, the fields and houses,² आयतनानि.

Yet the precise nature of this so-called individual ownership is not capable of determination from the materials that we possess. The father, the head of a family, may have a sort of ownership in the fields as well. But the legal relationship of the head of a family and its members is nowhere explained, and it is difficult to define it with any degree of precision. The rules about the inheritance of landed property do not occur before the Sutra period, and the instances of division in the Vedic literature do not relate to landed property. In the Satapatha Brahmana,³ the gift of land as fee to priests is mentioned, but with reproof.

A word of warning seems to be needed here. We do not say that in Vedic India property in land was vested in private individuals, far less that in India property in land was originally individual. All that we say is that we are not in a position to define precisely the nature of ownership in land, and that we have nothing in the Vedic literature to point to communal ownership. The reason for this dearth of materials might very well have been due to the fact that in those early days when land was very vast in proportion to the population, not much importance would be attached to the possession of it, and though we are told of measuring of fields and of well-defined fields, these might only have been needed for their proper occupation and cultivation.

¹ Rigveda, I. 100, 18.

² Chh. Up., VII. 24, 2.

³ Sat. Br., XIII. 6, 2, 18; 7, 1, 13, 15.

It must be remembered that in Vedic literature there is ample material for the conclusion that highly developed systems of village communities were in existence in Vedic India, though the village does not appear to have been a unit for legal purposes.¹ 'ग्राम' is the name for village in the Vedic literature and we are told of 'ग्रामणि',² 'ग्रामकाम'³ and 'ग्रामवादिन',⁴ in the various Vedic texts. According to Professors Macdonell and Keith Grāmaṇi or the village-elder seems to have been a nominee of the king rather than a popularly elected officer. But Rhys Davids thinks that he was elected by the village council or was a hereditary officer, the kings claiming the appointment only later. Grāmakāma points to the practice of the king's granting to his favourites his royal prerogatives over villages so far as fiscal matters were concerned. It rather indicates grant of regalia than grant of land. According to Zimmer Grāmaṇi had military function only. But there seems to be little reason for thus limiting the function of this officer. The Grāmavādin was a village judge and we are not in a position to say how was he appointed. We hear of a Śatapati⁵ also in the Vedic literature and Indra is very often designated by that name. It will not be unreasonable to surmise that there must have been an analogous human functionary who was the lord of a hundred villages and

¹ Hopkins' Journal, 13, 78, 128.

² Rigveda, X. 62, 11, 107, 5.

Ath. Veda, III. 5, 7; XIX. 31, 12.

Tait. Saṁ., II. 5, 4, 4.

Mait. Saṁ., I. 6, 5.

³ Tait. Saṁ., II. 1, 1, 2; 3, 2; 3, 9, 2.

Mait. Saṁ., II. 1, 9; 2, 3; IV. 2, 7.

⁴ Tait. Saṁ., II. 3, 1, 3.

Kaṭh. Saṁ., XI. 4.

Mait. Saṁ., II. 2, 1.

⁵ Mait. Saṁ. IV. 14, 12.

Tait. Brāh., II. 8, 4, 2.

must have occupied an important position in the eye of the people. The functionary named as 'भागदुव,' dealer out of portions, is one of king's Ratnin,¹ in the Yajurveda Saṁhitā² and Brāhmaṇa,³ and seems also to have been a village-officer, the supervisor of lands.

It is beyond our purpose to examine in details the village system prevailing in Vedic India. All that we need notice here is that there is ample indication of the existence of the village system; but the materials are not sufficient for the purpose of defining the exact legal position of the system. It will be a mere conjecture if we say that even in these early days land belonged to the village exactly as in later years. The little that we hear of the land system rather goes to indicate the contrary. We have already seen how individual families very often spoke of their landed possessions, and in view of those texts it will indeed be difficult to deny individual property in land prevailing in Vedic India.

¹ Tait. Saṁ., I. 8, 9, 2.

Kaṭh. Saṁ., XV. 4.

Mait Saṁ., II. 6, 5; IV. 3, 8; Vāj. Saṁ., XXX. 13.

² See Vedic Index. Ratnin is the term applied to those people of the royal entourage in whose houses the Ratna-havis, a special rite, was performed in the course of the Rājasūya or Royal Consecration. The list given in the Taittirīya Saṁhitā (I. 8, 9, 1) and Taitt. Brāhmaṇa (I. 7, 3, 1) consists of the Purohita, the Rājanya, the Mahiṣī, the Vāvāta, the Parivrikti, the Senāni, the Sūta, the Grāmaṇi, the treasurer, the Bhāgadugha, the Akṣavāha. In Śatapatha Brāhmaṇa (V. 3, 111) the order is Senāni, Purohita, Mahiṣī, Sūta, Grāmaṇi, Kṣattri, Saṁgrahitra, Bhāgadugha, Akṣavapa, Sonikaratna and Pālgala, the Parivrikti or discarded wife being mentioned as forbidden to stay at home. A briefer list of eight Virās is given in the Pañchaviṁśa Brāhmaṇa (XIX. 1, 4): brother, son, Purohita, Mahiṣī, Sūta, Grāmaṇi, Kṣattri and Saṁgrahitra.

³ Tait. Br., I. 7, 3, 5.

III. 4, 8, 1.

Sat. Br., I. 1, 2, 17.

V. 3, 1, 9,

Cf. Eggeling, S. B. E. 41, 63n.

Miraglia says: "It can no longer be doubted that in India before the system of caste, the property was collective. God gave the land to men for their enjoyment. They had no existence apart from the life of the tribe or family. When caste was introduced the Brāhmins considered that God had given them the land, which they allowed others to use."¹ It is indeed difficult to see on what materials is based this assertion of his. No doubt in the Vedas we are very often told that lands are given to men by Gods—and it is Gods who make men like Māndhātā² and Śvitrā's son,³ owners of fields. Yet in the Rigveda there is scarcely any material to support the conclusion that the individual had no existence apart from the life of the tribe or family. On the contrary we find fathers almost as absolute heads of families who may very well be taken as absolute owners of the family properties. No doubt in their younger years sons are under the absolute control of their fathers; but even in their case we find only a very mild type of *patria potestas* exercisable by the fathers and these sons are very often spoken of as being independent fathers themselves when sufficiently grown up.⁴ As to Brahmins claiming to be owner of lands as given to them by God there is material in the Vedic literature which would point to the directly contrary position. In the Aitareya Brāhmaṇa⁵ we are told who is the owner of the soil in connection with land for the purpose of देवयाजन, and a Brahmin there is enjoined to get it from the king. It cannot, after this, be said that it was ever the contention of these priestly classes that land belonged to them. It is only in the Dharma Śāstras of later years that we find such assertions.

¹ Miraglia, Comparative Legal Philosophy, p. 406.

² Rigveda, I. 112, 13—यामिः सूर्यं पयि यावः परावति सन्धातारं श्वेषपत्निषावतम् ।

³ Rigveda, I. 33, 15.

⁴ Cf. Rigveda, I. 89, 9.—इतमिन्नवरदो यमि देवा यत्रानयन्नाजरसं यन्नाय ।

III. 45, 4. पुत्रादो यत्र पितरो भवन्ति मामीषम्यारी पित्राद्युयमोः ॥

⁵ Ait. Br., VII. 20.

Baden Powell speaks of Vedic feudal system and asserts that Vedic society was a land-holding aristocracy

Vedic feudal system. superimposed upon an agricultural aboriginal stock.¹ It is no doubt quite possible that the aborigines had already taken to agriculture even before the advent of the Vedic Aryans in India, and it may be that one result of the conquest was that the conquerors got hold of the lands. Yet there seems to be little material for saying that the Vedic Aryans did in India what the Normans in England did after they conquered the country. The Vedic Vaiśya was an agriculturist and there is no reason to deny that he was an Aryan.

But who was the owner of the soil according to these Vedic Aryans? The position of the king in this respect is indeed obscure. Professors Macdonell and Keith refer to some Greek remarks on the question, and citing from Diodorus and Strabo state, "the Greek notices (in which, unhappily, it would be dangerous to put much trust, since they were collected by observers who were probably little used to accurate investigations of such matters),—vary in their statements. In part they speak of rent being paid, and declare that only the king and no private person could own land, while in part they refer to the taxation of land." Hopkins² is strongly of opinion that the payments made were as tax. The king was recognized as owner of all land and yet the individual or the joint family also owned the land. Baden Powell³ asserts that the idea of the king as a landowner was later. As against this Hopkins⁴ refers to those Vedic texts which speak of kings devouring the people,⁵

¹ Indian Vill. Comm., 190.

Cf. Pañch. Br., XXIV. 18, 2.

² Rigveda, III. 49, 4.

³ Rigveda, II. 17, 7. See also VII. 64, 2; VIII. 78, 8; etc., etc. (Tr. by Griffith.)

⁴ Rigveda, IV. 17, 7.

⁵ Rigveda, IV. 17, 5.

and according to which¹ the Vaiśya can be devoured at will and maltreated, and from these he urges that the king must have been the owner of the soil. The power of devouring however seems only to refer to political power and it is difficult to find any reference to ownership of soil in these texts.

But we have been wandering away hopelessly. As yet we have failed to point our fingers at anything where to seek the germ of primogeniture. In the Vedic literature itself there is very little that can help us in our quest. The Vedas say very little of the Vedic law of inheritance. No doubt here and there we hear of division of property during the owner's lifetime among his sons, and sometimes we are told how a father gives his grown-up sons their portions; but beyond these there seems to be little material for saying with certainty what was the law of inheritance in these early days. The Vedic word 'दाय' occurs in the Rigveda in the sense of reward of exertion (श्रम),² and if inheritance was its secondary sense it would follow that somehow or other the latter was connected with reward for exertion. It is beyond my purpose to trace how 'दाय' from reward of exertion became 'inheritance' and what inferences can be drawn from that as to Vedic theory of inheritance. It will however be interesting to notice here that the Vedic conception of property involved some labour invested in the material object and these Vedic Aryans allowed power of free disposition to the acquirer: "the Great Indra," we are told, "like Dhiṣaṃ deals forth strength and riches": विभक्ताभागं धिषणिव वाजम्. Very frequently in the Vedas we find the use of the word 'भाग' to designate 'property' and we are told

अमाजुरिव पित्रोः सचा सती समाना दासदसस्त्वामिये भगम्।
 जधि प्रक्रेतमुपमास्या भरदधिभागं तन्वोऽयेन मामहः ।³

¹ Rigveda, IV. 17, 11.

² Rigveda, V. 44, 6,

³ Rigveda, II. 17, 7. Tr. by Griffith.

"As she who in her parent's house is growing old, I pray to thee as Bhaga from the seat of all. Grant knowledge, mete it out and bring it to us here: give us the share wherewith thou makest people glad." It is indeed significant that 'भान' and 'विभान' are almost synonymous with property, and it is difficult to propound any theory of impartibility on the face of such texts.

But did priority in birth count for anything with these Vedic Aryans? We are told that Indra was the first-born of all and he was the protector of all those who came afterwards : ¹ Indra, the Primogenitus, was the king of all the created beings and it is he who alone can give them sufficient protection against all apprehension from enemies: ² Indra, the Primogenitus, is the leader of all by virtue of his superior strength and is 'संभक्ता' of all riches and divider of all properties: ³ Indra is the eldest and therefore the greatest of all Gods. ⁴ This Indra is powerful because he is the *representative of all the Gods*, because all the Gods have placed their property, strength and power in him :

Traces of primogeni-
ture.

“नहि तु यादधी मसोर्ध्वं कोवीर्वापिः ।

तस्मिन्मृत्युत क्रतुं देवा उजांसि संदधुर्बभूवुः स्वराज्यम् ।” ⁵

¹ Rigveda, IV. 17, 7.

² Rigveda, IV. 17, 5.

³ Rigveda, IV. 17, 11.

⁴ Rigveda, V. 44, 1

⁵ Rigveda, I. 80, 15.

"There is not, in our knowledge, one who passeth
Indra in his strength :

In him the Deities have stored manliness, insight,
power and might, lauding his own
imperial sway." (Griffith.)

These are indeed ample indications that priority in birth was of some social consequence with these Vedic Aryans. Kaṇva, son of Rishi Ghora, while addressing the Maruts earnestly craves to know which of them is the eldest and which youngest.¹ Rishi Dīrghatamā, while addressing the Ribhus, chaunts the Rik :

किं न इन्द्र जिघाससि भ्रातरो मरुतसुव ।

तेभिः कल्पस्व साधुया मा नः समरणेवधीः ॥²

“The Maruts are thy brothers, why, O Indra, wouldst thou take our lives !
Agree with them in friendly wise, and do not slay us
in the fight.”²

This seems to imply that the यज्ञभाग was due to Indra as the eldest brother and hence this being offered equally to Maruts, Indra took offence with the offerer. As regards the Maruts themselves they have equal right to ‘इव्य’ because they are all of equal age :

ते अजेयश्चा अकनिष्ठास उन्निदो मध्यमासो महसा दिवावृधः ।

सुजातासो जनुषा पृथ्निमातरो दिवो मर्या आनो अण्डा जिगातन ॥³

“ Having no eldest and no youngest in their band, no middlemost, pre-eminent they have waxed in might,
These sons of Priṣṇi, sprung of noble ancestry :
come hitherward to us, ye bridegrooms of the sky.”³

Rigveda V. 60, 5.

Rigveda I. 170, 2. (Tr. by Griffith.)

Rigveda V. 59, 6. (Tr. by Griffith.)

अजेयहासो अकनिष्ठास एते संभ्रातरो वाह्यः सौभगाय ।

ब्रुवा पिता क्षपा रुद्र एवां सुदुवा दृन्निः सुदिना मरुतः ॥¹

"None being eldest, none among them youngest, as brothers they have grown to happy fortune, May their sire Rudra, young and deft, and Priṣṇi pouring much milk bring fair days to the Maruts."¹

When again Mitra and Varuṇa are invoked as Governors of the mass they are styled as the eldest of all, and Indra, the destroyer of Vritra is ज्येष्ठ and is to be worshipped. ज्येष्ठ means the *greatest* and is used in the Rigveda in the specific sense of eldest brother.² Tvaṣṭā is invoked as *prior-born*, protector of prajā and leader.³

But these are only vague indications of some social consequence being attached to priority in birth. It is very difficult to say with any degree of precision what the exact position of the primogenitus was in the Vedic family. That some privilege was attached to the position seems to be clear from what we have said above. We are also told :

यदिन्द्र पूर्वी अपराय शिष्यं यज्ज्यायान् कनीयसो देष्णम् ।

अमृत इत् पर्यासीत दूरमाक्षित चित्रभरा रयिनम् ॥⁴

This seems to suggest that the acquisition of the younger ones would belong to the eldest. We have however also the text :

अभीषतस्तदाभरेन्द्र ज्यायः कनीयसः ।

पुरुवसुर्हि मघवन् सनादसि भरे भरे च हव्यः ॥⁵

¹ Rigveda V. 60, 5. (Tr. by Griffith.)

² Rigveda IV. 33, 5. X. 11, 2. See also Ath. Veda XII. 2, 35. Ait. Br. VII. 17. Śat. Br. XI. 5, 3, 8.

³ Rigveda IX. 5, 9.

⁴ Rigveda VII. 20, 7. "Whenever the elder fain would help the younger, the greater cometh to the lesser's presence."

⁵ Rigveda VII. 32, 24.

where we are told that it is the duty of the eldest to make provisions for his younger brothers. In the Rigveda the Primogenitus is almost identified with the person superior in strength and usually the protector of the family. His position is more onerous than privileged and if he is privileged at all it is perhaps because of some such principle underlying the saying—

मन्त्रमथर्वं सुधितं सुपेयसं दधात यन्नियेष्या ।
पूर्वोक्तं प्रसितयस्तरन्ति तं य इन्द्रे कर्मणाभुवत् ॥¹

Before closing these pages we should say a word about regal succession in the Vedic Age. It appears that the normal form of government in Vedic India was that by kings, as might be expected in view of the fact that the Aryan Indians were invaders in a hostile territory: a situation which, as in the case of the Aryan invaders of Greece and of the German invaders of England, resulted almost necessarily in strengthening the monarchic element of the constitution. In the Rigveda¹ as well as in later literature² the King is designated Rājan, and the term occurs repeatedly in the Vedas. Zimmer is of opinion that the Vedic monarchy was sometimes hereditary as is shown by several cases where the descent can be traced.³ We hear of दशपुत्रवराण्यम् in Śatapatha Brāhmaṇa⁴ and Aitareya Brāhmaṇa,⁵

¹ Rigveda VII. 32, 12. "His portion is exceeding great like a victorious soldier's spoil, Him who is Indra, Lord of Bays, no foes subdue. He gives the Soma-pourer strength." (Griffith.)

² Rigveda III. 43, 5. V. 54, 7, etc. Ath. Veda IV. 22, 3, 5. VIII. 7, 16.....

³ E. g. Vadhryasva, Divodāsa, Pīṇivana, Sudāsa, Purukutsa, Traśadasyu, Mitrathithi, Kurusravaṇa, Upamasravasa.—Lennan Sanskrit Reader, 386.

⁴ Śat. Br. XII. 9, 3, 3.

⁵ Ait. Br. V. 4, 2, 8.

and these also indicate hereditaryness of the monarchy. Yet in others, the monarchy seems to have been elective, though it is not clear whether the selection by the people was confined to members of the Royal family only or extended to all the members of the noble class. The passages that would indicate the elective system are however few,¹ and the evidence they give of elective monarchy is not indeed very strong. Geldner argues that all the passages can be regarded only as evidence of acceptance by the subjects distinguished from choice by them. But such acceptance would itself point to an earlier elective system which the powerful monarchs must some how or other have succeeded in superseding, reducing the choice into a mere acceptance. We might refer to the story of the Kuru brothers 'Devāpi' and 'Śāntanu' as given by Yāska in his Nirukta wherein may be found a practice of selecting one member of the family to the exclusion of another as better qualified. The value of this story as evidence of contemporary views is not seriously affected by the legend itself being of dubious character and validity.²

So far as the system was elective it would be of no assistance to us in our quest. Besides we do not know how this power of election was exercised and whether it was in any way limited. As to the hereditary monarchies again we nowhere find the rules of succession. It is even difficult to say whether these were impartible offices, specially in view of the fact that later on we find monarchs dividing their monarchies amongst several sons. All that we can say is that from those Vedic texts where a particular deity is styled the king because of his priority in birth we may draw the inference that analogous

¹ Rigveda X. 124, 8, 173. Ath. Veda I. 9. III. 4. IV. 22.

² Royal power was not very secure,—expulsion of kings are very often spoken of, and we hear of their efforts to recover possession (अपहृत) Ath. Veda III. 3, 4. Kath. Sam. XXVIII. 1. Tait. Sam. II. 3, 1.

provisions must have been prevalent in human societies ; and when we remember how people model their Gods according to their own surroundings, we may rest assured that the inference would not be very wrong. Yet it is very difficult to assert that any rule of primogeniture crystallized in Vedic India.

Hitherto we have occupied ourselves with a period when the Aryans were first settling in India and did not as yet spread throughout the country.

The age of artificial and complex ceremonials.

The Rigveda is indeed full of stories of such migration, and there is no dearth of materials to show how these Aryans were mostly occupying themselves with war against the aborigines, and were busy settling themselves in the conquered tracts spreading out in all directions by clearing forests and rendering forest lands fit for cultivation. Gradually however the struggle is almost over, the aborigines are almost completely vanquished and the Aryans become well settled in India. The period about which the Brāhmaṇas form our sources of information is the one which marks the end of all external struggle giving these settlers ample leisure for turning their minds to other serious matters. It marks the most important period in the social and mental development of India, the Brāhmaṇa literature representing the intellectual activity of a sacerdotal caste. The religion becomes highly ceremonial. In the place of simple hymns of the Rigveda we have the complex and apparently meaningless ceremonials of the Yajurveda and the highly artificial systems of the Brāhmaṇas. Speaking of the Brāhmaṇas it has been rightly remarked that "for wearisome prolixity of exposition, characterised by dogmatic assertion and a flimsy symbolism rather than by serious reasoning, these works are perhaps not equalled anywhere."¹ Yet the charge against the sacerdotal caste that it is this caste "which, by turning to account

¹ S. B. E., Vol. XII, Introduction.

the religious instincts of a gifted and naturally devout race, had succeeded in transforming a primitive worship of the powers of nature into a highly artificial system of sacrificial ceremonies, and was ever intent on deepening and extending its hold on the minds of the people, surrounding its own vocation with the halo of sanctity and divine inspiration " seems to be unjustifiable. It cannot be doubted that the primitive worship was losing its simplicity even before the introduction of the caste system. Even during the period of Rigveda, hymns were gaining supernatural virtues and mysterious efficacy. The ceremonial restraints were, as has been said by Spencer, the natural consequences of the desire to follow the less understood worship of the powers of nature instituted by the ancestors. The devout belief in the efficacy of invocation and sacrificial offering which pervades most of the hymns of the Rigveda, and which may be assumed to reflect pretty faithfully the religious sentiments of those amongst whom they were composed, was equally shared by those who gradually formed the later sacerdotal caste. If the sacerdotal class gained in social position, it was partly because of this religious sentiment of the people and partly due to their own superior gift of sacred utterances. Even during the period of Rigveda priests, though not as yet forming a distinct caste, were looked upon with considerable amount of respect and reverence. His superior culture and habitual communion with divine rulers of the destinies of man would naturally entitle him to a place of honour by the side of the chiefs of the clans or the rulers of the kingdom. In Rigvedic India priests did not form a caste by themselves. Yet even during that period the religious service seems to have been of a sufficiently advanced nature to require some kind of training for the priestly office, and we hear of family priests of Rigvedic kings. As time goes on the simple ceremonials of the ancestors become less and less intelligible, and consequently more and more formal and complicated, necessitating the distribution of the sacerdotal functions among distinct

classes of priests. These priests thus gradually formed a distinct class,—became the Brāhmans. Equally with the people they believed in the ceremonies and in the artificial rules of performance of them. The exclusive devotion of these priests to culture, their learning and noble character, and the devout belief of the people including themselves in the efficacy of the sacrificial offering, gradually raised them to a supremacy over the people—over the Kṣatriyas as well.

We might stop here to see on whom in the family fell the duty of sacerdotal office before the formation of a priestly caste. It is indeed difficult to answer this question from the Rigvedic texts. In a hymn addressed to Agni we are told that he (Agni) alone stands as the invoker of the deities amongst the sons of Manu and he is the owner of their riches.¹ It is however not at all safe to infer from such passages as this that the primogenitus in the family was its priest. Indeed the Rigvedic texts rather seem to indicate that all the members including the females did take part in the religion. As regards the story of the Kuru brothers, Devāpi and Śāntanu, given by Yāska in his Nirukta, it only gives us the practice prevailing at some later period. The story of Sunasepha too does not help us much in solving the question for Rigvedic India : the story is the property of the post-Vedic age, and if it speaks of the primogenitus having the right to the sacerdotal office,² it only shows the rule prevailing in the post-Vedic age.

Popular religion during this period also became more and more complicated, and the theory of after-life existence with which ancestor worship is intimately connected underwent considerable change. In the Rigveda we do not hear of the Pitris returning again on earth. But during this period these Pitris go to the world of the fathers, thence to the ether, thence

¹ Rigveda I. 68, 4.

² अवीयत देवरातो ऋष्यवीर्यवीर्यः ।

अङ्गुलीयं चापिप्रत्ये देवे वेदे च नाङ्गुलीयम् । (Ait. Br. VII. 18.)

again to the Moon. "Having dwelt there till their good works are consumed, they return again that way as they came, till they attain some birth the nature of which depends on the nature of the works done by them while living here during previous birth." पित्रलोकादाकाशम् आकाशाच्चन्द्रमसम्...तस्मिन्नावस्य्यातमुषित्वा नृजैर्नृपैश्चानाम् हुनर्निधतंसे यजेतम् ।¹ Ancestor worship no doubt continues as of old, but it undergoes some change in the detailed ceremonials, or rather it becomes complex and full of ceremonials. The faith in after-life existence is not shaken; the necessity for food supply for such existence becomes more and more felt till "this food the fathers make their lives' sustainer."² Men begin to give monthly offerings to the *Pitris*,³ paying special attention to a limited number of them: "The fathers of our father, his grandfathers, these Pitris shall they worship with oblations."⁴ The limit to the number of Pitris to be worshipped was perhaps a necessary consequence of the change in theory of after-life already noticed. It might also be due to the breaking up of joint families already adverted to as a result of friction between cousins. In the whole literature of this age the word **भ्रातृव्य** almost always means an enemy.⁵ Naturally no one could rely on such an enemy for his sustenance in after-life. Possession of a son thus gains another important string to its bow, although even now a sonless man can, if he conducts himself well in this life, reach the highest heaven.⁶

We have already remarked that this is an age which may very well be characterised as the age of artificial and complex

¹ Chh. Up. V. X. 4 to 7.

² Ath. Veda. VIII. X. 23.

³ Ath. Veda, VIII. X. 19.

⁴ Ath. Veda, XVIII. II. 49; Sat. Br. II, VI. 1, 34 and 36; also II. 4, 2, 23.

⁵ वरुणेन प्रवर्षिताः भ्रातृव्या नी सपत्नयः ।

असूतम् रजः अपि अगु ते यन्तु अथनम् तनः । (Ath. Veda X. 3, 9.)

(See also Ath. Veda II. 10. 1.)

⁶ ये अयवः यजमानाः परे युधि त्व इवा स्मयत्यवकाः ।

ते यामुदिवाविदन् लोकं नाकस्य पृष्ठे वशि दीप्यानाः ॥ (Ath. Veda XVIII. 11, 4, 7.)

ceremonials. Indeed everything natural has a tendency of growing into an artificial system. At its touch even the natural position of the Vedic eldest brother crystallizes into certain rules of conduct during this age. We have examined the position of the eldest brother in Rigvedic India, and what seems to have been natural deference due to seniority develops many hard and fast rules. Here for the first time we are told of पवित्रता¹ and अग्रदधिषु.² These are sinful persons according to the Yajurveda Saṁhitā, Parivettā denoting an elder brother who is not married even when his younger has taken a wife, and Agredidhiṣu or Agredadhus being the man who wed a younger sister while the elder is as yet not provided with a husband. These indicate no privilege attached to the position of the Primogenitus. If any inference indeed is legitimate from them, they speak of the onerous nature of the duties involved in the priority of birth rather than any privilege or right.

Here we may notice a few passages from the Sūtra literature where we have some direct indication of the social position of the Primogenitus. In *Saṅkhāyana Grihyasūtra* we find the following passages: "Some declare that the domestic fire should be kindled at the time of the inheritance, or that after the death of the householder the *eldest* one himself should kindle it."³ Nārāyaṇa, while commenting on this, says, 'the eldest son or the son who after his elder brother's death becomes the eldest.' According to Pāraskara Grihyasūtra "the setting up of the

Social position of the first-born.

Ath. Veda, VI. 1112, 3.

Kaṭh. Saṁ., XXXI. 7.

Kaṭh. Saṁ., XLVII. 7.

Mait. Saṁ., IV. 1, 9.

Tait. Br., III. 2, 8, 11.

Vājasaneyi Saṁ., XXX. 9.

Mait. Saṁ., IV. 1, 9.

S. B. E., XXIX, p. 13 (Tr. by Oldenberg).

Avasathya (or sacred domestic) fire is performed at the time of his wedding or at the time of the division of inheritance according to some teachers.”¹

This kindling of domestic fire² seems to indicate setting up of a household establishment for the person who kindles it, and in case of division of inheritance, all the divided sons would no doubt have to set up their own establishments. In case the family remains joint the eldest brother would have to kindle it, and the household thus set up would be his household—he thus taking up the position of the father. It is interesting to note that at least in this matter lineal primogeniture is not recognised. In case of death of the eldest, the next brother shall have the right or rather the duty of setting up the fire.

We have already seen how partition of inheritance has not been unknown even in the days of the Rigveda, and the stories of division³ taking place even during the life-time of the father have already been noticed. Yet the normal post-Vedic family seems to have been joint. Even during the period of Mahābhārata jointness is recommended, as is evident from the story of *Gaja-Kachchhapa*, where it is distinctly stated that the division of property by brothers is not commended by the sages.⁴ Again

¹ c S. B. E., XXIX, p. 271.

² The sacred fire kindled by a man is taken with him when dead, See *Āśvalāyana Grihya Sūtra*, IV. 2, 1.

³ Thus Manu is said in the *Taittirīya Saṁhitā* to have divided his property among his sons omitting Nabhanediṣṭo.

In *Aitareya Brāhmaṇa* the division is said to have been by *Manu's* sons during his life-time.

According to *Jaimintya Brāhmaṇa* again the sons divided the property while their father was alive.

According to *Pañchaviṁśa Brāhmaṇa* the father might prefer any one during his life-time.

Taittirīya Saṁhitā seems to indicate that the elder sons were preferred. Women were excluded from partition.

⁴ *Mahābhārata Ādiparva*, Chap. XXIX.

Indra recommends Vasu to settle in the country known as Chedi, and his reason for this recommendation is that the brothers there live jointly.¹ The latter no doubt might imply that joint families in other parts of the country were rare. But then it speaks of a period much later than the one under our observation.

There is ample indication of the fact that in the post-Vedic age the Primogenitus has secured for himself some position of consequence in the family. The Aitareya Brāhmaṇa says² :—

Traces of Primogeniture.

अथैष्ठ्यं वा एष यद् द्वादशाहः, स वै देवानां अथैष्ठ्यं य एतेनाग्रेऽयजत, अथैष्ठ्यं वा एष यद् द्वादशाहः, स वै देवानां अथैष्ठ्यं य एतेनाग्रे यजत इति, अथैष्ठ्यं यजत कस्याणीह समा भवति..... इन्द्राय वै देवा अथैष्ठ्याय अथैष्ठ्याय नातिष्ठन्त, सोऽब्रवीद् ब्रह्मन्ति याजय मा द्वादशाहनेति, तमयाजयत्ततो वै तस्मै देव अथैष्ठ्याय अथैष्ठ्यातिष्ठन्त इति तिष्ठन्तेऽस्मै स्वा अथैष्ठ्याय अथैष्ठ्याय समन्विन् स्वाः अथैष्ठ्यायां जानते य एवं वेद ।

No doubt in the above extract we equally find indications of struggle for keeping up the position of the eldest. Already

¹ *Ibid.*, Chap. LXIII.

² Ait. Br. Pañch. IV. 25 or Chap. XIX, Khaṇḍa IV. 25 :

"The twelve-day sacrifice is for the first-born. He who first performed it became the first-born among the gods. It is the sacrifice for a leader. He who first performed it became the leader among the gods. The first-born, the leader of his family, ought to perform it alone, then happiness lasts all the year where it is performed."

"The gods once upon a time did not acknowledge that Indra had the right of primogeniture and leadership. He said to Brihaspati, 'Perform for me the twelve-day sacrifice.' He complied with his wish. Thereupon the gods acknowledged Indra's right of primogeniture and leadership."

"He who has such a knowledge is acknowledged as the first-born and leader. All his relations agree as to his right to the leadership."

(See Sarvadhikary, T. L. L., 2nd Ed., p. 174.)

his position is on the wane, and it is necessary for him to invoke the aid of gods to secure him in it. Yet it seems clear enough that the eldest son had a claim to leadership and was the head of the family in the normal condition of its jointness.

That the position of the eldest son was of some consequence in these days appears also to be indicated in the story of Śunaḥśepha already noticed. When Viśvāmitra offered to adopt Śunaḥśepha the latter would not agree unless and until he is given the position of the first-born in the adoptive family.¹

स होवाच विश्वामित्रो भीम एव सौयवसिः शासेन विशिशसिषुः, प्रस्थान्ये तस्य पुत्रोभूर्ममैवोपेहि पुत्रतामिति । स होवाच शुनःश्रेयः स वै यथा नो ज्ञापयामास राजपुत्रं तथा वद । यद्वैवाऽङ्गिरसः सन्नपेयां तव पुत्रतामिति स होवाच विश्वामित्रो ज्येष्ठो मे त्वं पुत्राणां स्वास्तव श्रेष्ठा प्रजा स्यात् । उपेया देवं मे दायं तेन वै त्वोपमन्त्रय इति ।

Professor Sarvadhikary says, "It is clear from the passages quoted above that the first-born was the leader of his family and was entitled to the family property as his birthright; or in other words primogeniture was the settled law of succession in ancient India."² It is unfortunately not clear how that conclusion can be drawn from the above texts. On the contrary it seems to point to a different conclusion: Devarāta was made the eldest son in Viśvāmitra's family; yet so far as the adoptive family was concerned he became owner in "देव" and "वैद"—and could still inherit from the family in which he was born though he was only the second son in that family.

Thus it is difficult to say that in private succession the rule of primogeniture prevailed in the post-Vedic age. No doubt passages like "they distinguished the eldest son by the heritage"³ may point to a different conclusion; yet taking all

¹ Ait. Br., XXXIII. V. 17.

² T. L. L., p. 176.

³ Tait. Sath.

See Prof. Sarvadhikary, T. L. L., p. 177.

the texts and circumstances into consideration we shall not be very wrong if we say that there was no hard and fast rule of primogeniture in the post-Vedic successions.

Yet the primogenitus is looked upon with special commendation, and special ceremonies are attendant upon the first conception.¹ The first-born again has special duties towards the Pitris and his position in this respect is onerous.

Before leaving the subject it is necessary for us to have a glimpse of the land system prevailing in India during this age. There are materials in the post-Vedic literature that might indicate a sort of feudalism prevailing in the country. But we shall first of all give the texts on which we want to rely.

In the Śatapatha Brāhmaṇa we are told, "Being about to build the Gārhapatya he sweeps its site with a Palāśa branch. For when he builds the Gārhapatya he settles on the place; and whatsoever builders of fire-altars there have been, they are indeed settled on this earth; and when he sweeps he thereby sweeps away those settled there before him thinking "lest I should settle on those already settled."

"Yama hath given the settlement on earth to this sacrificer. For Yama indeed rules over the settling on this earth, and it is he who grants to this sacrificer a settlement on this earth."

"The fathers have prepared this place for him.² For Yama is the Kṣatra (nobility or ruling power), and the fathers (deceased ancestors—पितृ) are the clansmen; and to whomsoever the chief (Kṣatriya) *with the approval of the clan*, grants a settlement, that settlement is properly given: and in like manner does Yama, the ruling power, with the consent of the

¹ Śākh. Grihya Sūtra, I. 22; I. 24.

Āśvalāyana Grihya Sūtra, I. 13, 1; I. 15, 1.

Pāraskara Grihya Sūtra, I. 16, 18, etc., etc.

² Vedic Index, Kṣatriya, p. 203.

Pitris (the clan) now grant to this sacrificer a settlement on this earth."

Elsewhere in the same Brāhmaṇa we find: "But Tāṇḍya used to say 'surely the bricks possessed of prayers are the nobility and the space fillers (lokaṃprinā) are the peasants; and the noble is the feeder, and the peasantry, the food; and where there is abundant food for the feeder, that realm is indeed prosperous and thrives.'"

It would appear from the above extracts that क्षत्रिय had some special place in the land system of these early days. Who these Kṣatriyas were is not easy to answer. Professors Macdonell and Keith say: "The evidence of the Jātakas points to the word 'Khattiya' denoting the members of the old Aryan nobility who had led the tribes to conquest, as well as those families of the aborigines who had managed to maintain their princely status in spite of the conquest. In the epic also the term Kṣatriya seems to include these persons; but it has probably a wider signification than Khattiya, and would cover all the royal military vassals, and feudal chiefs, expressing in fact, pretty much the same as the barons of early English history. Neither in the Jātakas nor in the epic is the term co-extensive with all warriors; the army contains many besides the Kṣatriyas, who are the leaders or officers, rather than the rank and file."¹

Whatever that be, so far as the period under our review is concerned even Macdonell and Keith agree that the Kṣatriya stands as a definite member of the social body,² and the earlier

¹ Vedic Index, Kṣatriya, p. 203.

² Ath. Veda, VI. 76, 3. 4.

XII. 5, 5, 44.

Vāj. Saṃ., XXX. 5.

Ait. Br., VII. 24.

Śat. Br., I, 3, 2, 15; IV. 1, 4, 5, 6, etc., etc.

use of the term in the Rigveda is exclusively connected with royal or divine authority.¹ It is neither possible nor necessary for us to determine what persons were included in the term Kṣatriya. That it covered the royal family may be regarded as certain. There is another term, Rājanya, in the Vedic literature, which seems to mean almost the same class of persons, though there are passages to indicate that these two were not identical. In Aitareya Brāhmaṇa, for example, we are spoken of Rājanya asking a Kṣatriya for a place for देवयज्ञ.² It would scarcely be correct to say that Kṣatriya in 'the Vedic times denoted the warrior class. In the Rigveda³ and later⁴ we are told of persons other than Kṣatriya regularly fighting.

Towards the common people, Kṣatriya in these early days stood in relation of well-nigh unquestioned superiority,⁵ and Vaiśya, the Vedic and post-Vedic agriculturist, is described as tributary to another. They are said to be अन्यस्य बलवत्, अन्यस्याय, यथाकामजेय,⁶ and all these epithets were perhaps used to define the relation of the nobles and the agriculturists. If any inference is legitimate from these it may be taken as sufficient indication of how these agriculturists were at the mercy of the nobles. We are informed तस्मत् राजन्येनाध्यक्षेण वैश्यम् व्रजति⁷ and all these go to show that though the relative position of the Kṣatriya and Vaiśya had perhaps nothing to do with

¹ Rigveda, IV. 12, 3; 42, 1; V. 69, 1; VII. 64, 2; VIII. 25, 8; 56, 1; X. 109, 3.

² Cf. Pañch. Br., XXIV. 18, 2; Kāth. Saṁ., XX. 1.

³ Rigveda, I. 69, 3; 126, 5; IV. 24, 4; VI. 26, 1; VII. 79, 2; 33, 6; VIII. 18, 18; 96, 15.

⁴ Ath. Veda, IX. 7, 9. Gaut., VII. 6; Vasiṣ., II. 22.

⁵ Kāth. Saṁ., XVI. 4; XXI. 10; XXII. 9; XXIX. 9, 10.

Ait. Br., II. 33; Sat. Br., XI. 2, 7, 15, 16; Mait. Saṁ., IV. 4, 9, 10; 6, 8, etc.

⁶ Ait. Br., VII. 29.

⁷ Kāth. Saṁ., XXVII. 4.

property in land, there was a sort of feudalism unconnected with landed property prevalent in ancient India.

We have noticed elsewhere what is the significance of the Vaiśya's being devoured at will, and how some scholars have asserted that this leads to the conclusion that the king was the land-owner, the cultivators only holding it with his leave and licence; while others found in it only a political power unconnected with any question of ownership of land. It is however beyond our purpose to examine these different conclusions. All that we might notice here is that the passage quoted above from the Śatapatha Brāhmaṇa goes far to show some sort of communal control over landed property. No stranger, it seems, could be introduced even by the king unless and until the consent of the community was secured. So far as the members of the community are concerned there seems to be little doubt that they held lands as their separate properties, and we are not in a position to say how far individualism developed so as to override the ownership of the family. Rules relating to inheritance of landed property do not occur in this post-Vedic literature, and we cannot say whether or not division of land was possible. Aught that we know there appears to be nothing in the post-Vedic theories of ownership which would prevent such a division.

If there is not much in the post-Vedic literature to enable us to say with certainty that primogenitary rules prevailed in private succession, the material is equally scanty for ascertaining the rules of regal succession in these ancient days. We have already observed how different scholars have differently interpreted texts, some asserting hereditary monarchies in ancient India while others only speaking of an elective system. If indeed elective system was the one that prevailed in those days it would follow that in royalties only single succession was possible. That to begin with the election by the people was the only mode of succession in headships or kingships, there

seems to be little doubt about that. The gradual supersession is marked by the next stage where in the place of election we find 'recognition' by the people. The powerful monarchs gradually succeeded in securing the throne to their sons; yet time was not yet ripe when they were in a position to assert proprietary rights in the throne by dividing the kingdom among their sons. No doubt in later India we hear of kings making such division; but that must be a later development.

In the Śatapatha Brāhmaṇa we are told "and to him who is his (the king's) dearest son, he hands that vessel, thinking 'May this son of mine perpetrate this vigour of mine.'"¹

"He then returns to the Gārhapatya fire, his son holding on to him behind, and offers with 'O, Prajāpati, than thee none other hath encompassed all these forms: for whatsoever object we sacrifice, let that accrue unto us! This one is the father of N. N!'—him who is the son, he makes the father, and him who is the father, he makes the son: he thereby links together the vigour of both of them."² According to the ceremonial of the Black Yajus the offering of the residue takes place at the house first of the favourite son, and then of the queen. Taittirīya Saṁhitā also gives in details the same ceremonial with some variation.³

The above ceremonial takes place after the king has been presented to his people by the Purohita: "Him, the son of such and such (a man), the son of such and such (a woman)—whatever be his parentage regarding that he says this;—'of such and such a people'—that is to say, of the people whose king he is;—'This man, O ye people, is your king, Soma is the king of us Brāhmaṇas!'—he thereby causes everything here to be food for him (the king); the Brāhmaṇa alone he excepts."⁴

¹ Śat. Br., V. 4, 2^o, 8.

² Śat. Br., V. 4, 2, 9.

³ Taitt. Saṁ., Vol. II, p. 154.

⁴ Śat. Br., V. 4, 2, 3.

But we do not find king's eldest son in the ceremonial. We are told of his favourite son, of his dearest son ; and if anything can be gathered from this it seems to point to an epoch when kings have already had acquired the right of choice amongst their son.

It will be interesting to note here that if primogenitary rule at all prevailed in regal succession, it must have been lineal primogeniture. We find in the same Brāhmaṇa a passage which indicates the position of the king's brothers : " Brāhmaṇa then hands to him (king) the sacrificial sword...the king hands it to the king's brother saying ' Indra's thunderbolt thou art, therewith serve me ! ' Thereby the king makes his brother to be weaker than himself. The king's brother hands it either to the Sūta or to the Governor, the latter, on his turn, handing it over to the Grāmaṇi and the Grāmaṇi to a tribesman." The king's brother is an officer of the highest rank, but king's vigour is linked only with that of his son.

Western scholars place the Sūtra period as contemporaneous with the first rise of Buddhism. Literary compositions belonging to the periods earlier than the one under our review, all claim divine origin and absolute authority perhaps to check religious reforms. During the Brāhmaṇa period the Saṃhitās have already become sacred and unintelligible, the whole period being busily occupied with systematising and interpreting the strains of forefathers. Even the Brāhmaṇa literature was sacred and divine, and any questioning of these based on individual reason was heretical. Such stringency was devised, it is suggested, to check religious reforms and it must have, for a period, succeeded in attaining its object. Hindus have always been devout and peaceful, and their disposition has never been such as would embark them easily on hazardous experiments, on reforms, specially in the field of religion. Yet the very devoutness in them must have revolted against such theories as would deny them any access to truths, and if theories could for a moment check reforms, it

Sūtra period.

ultimately led to a revolution—it led to the rise of Buddhism. Buddhism meant the overthrow of a system which had tried to maintain its position by an appeal to a divine revelation, and Buddha directed the strenuous oppositions to the exclusive privileges of the Brāhmaṇas. One great merit of Buddhism was that it was a system of easy devotion, open to all, and those who were frightened by the difficulties of Brāhmanical science began to embrace Buddhism where there was no such difficulties. But the Brāhmaṇas could ill afford to lose their hold on the people; and to remove the difficulties in teaching Brāhmanical tenets, Śaunaka, Kātyāyana and others adopted the novel system of Sūtra.¹

Whatever that be, the rise of Buddhism marks the development of egalitarian ideas and in this respect is antagonistic to the growth of primogenitary rules. It must, however, be said that the new principles involved in Buddha's tenets did not disfavour respect for seniority.

In order to find out the law for this period it is no longer necessary for us to grope in the dark. We have more definite informations about the rules of law during this period in the Sūtras and Saṁhitās, though, of course, much intermixed with matters religious and moral.

It is unnecessary to tell you that the family organization of the Aryans of this age was patriarchal. We have already noticed that it had been so even during the Vedic age. Nor is it necessary for us to proceed to ascertain the conditions leading to the formation of the patriarchal organization. Paternity, we are told, is shown in history when there is established an individual

¹ Max Müller.

This might have been the reason for the prevalence of the Sūtra literature. But that Sūtras were composed even at an earlier period seems evident from the fact that Yāska quoted legal rules in the Sūtra style, evidently, from some Dharmasūtra existing at his time.

control in the form of matrimony,¹ and the law of marital union at first depends less on the law of relationship, not to speak of affection, than on the law of property and authority.² That paternity is a derivation of the right of ownership is proved by diverse facts. One of these proofs is traced by scholars to the ancient Aryan language, particularly in the Vedic literature. "A father, in Sanscrit, is called a 'pātar,' owner, or 'janitar' creator. In the Vedas the two terms are joined, forming *pitājanitā*.³ Such a conjunction, and later such a confusion, of the conceptions in the language are sure indications of the influence of property rights in the development of masculine family."⁴

The earliest patriarchal groups seem to mean the paternal administration of the property in the interest of the family. Whether or not it is possible for a savage, "with his selfishness and without any idea of justice or sentiment of responsibility" to administer the goods and chattels in the interest of his family, such a system of paternal administration did, as a matter of fact, prevail in Vedic India, and these Vedic Aryans were neither savage and selfish, nor without any idea of justice and sense of responsibility so as to render the existence of the system impossible. We have already noticed the extent of paternal power in Vedic India, and have seen how, even in that early age, the father is almost the owner of the property belonging to the family. But we are not certain whether the property included land as well, and whether the early Vedic families were not still the migrating ones, so that not being as yet able to establish itself in certain places its indefiniteness hindered extensive cultivation of land with the result that land was not yet valued much. Later on however the family became well

¹ Miraglia, p. 655.

² Vinogradoff, p. 197.

³ Cf. Rigveda, IV. 17. 12.

⁴ Miraglia, p. 655.

established in certain places, and it is only when the family thus becomes certain, and establishes itself in certain places, when the occupation of territory becomes settled, in consequence of the increasing congestion of inhabitants, that the appropriation of land assumes strict forms. The Smritis and Sūtras contain abundant materials concerning property in land, and before proceeding to discuss the law relating to it, it will be necessary for us to review the nature of a Hindu family during this period. We have observed that an ordinary Vedic family was joint. We read in the Rigveda of a bride who is invited to take charge of a household where she would find her parent-in-law and many other relations: she is invited to "be a queen over her father-in-law, mother-in-law, husband's sisters and husband's brothers."¹ During the Rigvedic age the jointness of the family seems to have been the rule though, of course, partition was not impossible; ² and we have seen how gradually during the later years, partition became more common. Yet jointness remained the rule and the Sūtras very often refer to the common management of families which have outgrown the stage of the primordial group of father, mother and children. In the Dharmasūtras and Smritis, the institution of joint family is indeed considered chiefly from the view-point of its possible dissolution by partition. Vasiṣṭha,³ for example, speaks of partition amongst the brothers and gives rules of law for the purpose without a word as to how the affairs would stand in case there be no partition; while Gautama⁴ gives a rule as to what happens in case the brothers would not come to a division though he too mainly

¹ Rigevda, X. 85. 46.

² Stories of division have already been mentioned.

³ Vasiṣṭha Saṁhitā, XVII.

⁴ Gautama Saṁhitā, XXIX.

speaks of rules of partition as more commendable. Manu says :

जहं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।
 भजेरन् पैट्रकं रिक्क्यमनीशास्ते हि जीवतोः ॥
 ज्येष्ठ एव तु गृह्णीयात् पित्रं धनमशेषतः ।
 शेषास्तमुपजीवेयु र्यथैव पितरं तथा ॥ ¹

"After the death of the father and of mother, the brothers, being assembled, may divide among themselves in equal shares the paternal estate ; for they have no power while the parents live. Or the eldest alone may take the whole paternal estate, the others shall live under him just as under their father." And like Gautama he too is of opinion पृथग्विवर्द्धते धर्मस्तस्माद्धर्मा पृथक्क्रिया.² This however does not mean in any way that partition was the normal consequence of the decease of a householder.³ The sons of a householder generally continued to manage their affairs in common as before ; but it was advisable from a juridical point of view to anticipate the possibility of partition, and to lay down rules as to the relative rights of interested persons. "The supposition that in the ordinary course of affairs, common management remained the usual expedient is supported by the fact that right through recent history, and up to our times, Indian families keep together as far as possible and submit to division only with great reluctance."⁴ We have already referred to texts in the Mahābhārata which would support the above view of Prof. Vinogradoff. The Mahābhārata,⁵

¹ Manu, IX. 104, 105. •

² *Ibid*, III. See also Vishṇu, XVII ; Yājñavalkya, II, 118, 119 ; Baudhāyana, II. 38.

³ Vinogradoff, p. 262.

⁴ Vinogradoff, p. 262.

⁵ Ādiparva, XXIX.

in its story of Gaja-Kacchapa, tells us of the fate of two brothers who desired to come to a partition, and the reading of the text at least points to the fact that though law made it possible for a younger brother to claim partition, practice must have been otherwise, and public opinion must have been very strong against such claims. There the desire to partition is characterized as due to ignorance and is condemned as always resulting in enmity of brothers. Similarly Indra speaks very highly of the inhabitants of Chedi because there the brothers always remain joint.¹

Prof. Jolly in his Tagore Law lectures says that partition of property was entirely unknown in the earliest period of Indian Law. What we have already said above would make it sufficiently clear that the statement is not altogether correct. It would be incorrect to say that partition was entirely unknown. Instances of partition are to be found even in the Vedic literature. Prof. Ghosh² views these instances as indicative of the fact that in ancient India, without a disposition *inter vivos* by the father, the eldest or the most capable among the sons took the entire inheritance as *Prabhu* or *Lord* of the family, and that partibility amongst brothers owed its origin to the natural affection and sense of justice of the father who to secure the rights of younger sons, made it a point to divide his wealth during his life-time. Prof. Ghosh however altogether ignores the fact that the Vedas speak also of partition amongst brothers during the life-time of their father and sometimes perhaps against his desire. When the family chose to remain joint, no doubt the eldest very often managed it and this must have been the outcome of the wish to organize the family as strongly as possible under the natural leadership of an efficient householder. This sometimes runs counter to the idea of *patria-potestas* and we are told of sons becoming fathers when fathers grow old; and

¹ Mahābhārata, Ādiparva LXIII.

² T. L. L., p. 16.

there are hymns¹ in the Vedas which have been taken to contain a reference to a father exposed by his children. But it is difficult to say if the invariable rule in Vedic India had been that the eldest shall succeed in exclusion of all other sons.

If not as a rule of law, yet as a custom, primogeniture seems to have been the practice in these ancient days. The Gaja-Kacchapa story and the other texts already referred to would indicate that though the eldest would be the head of the family and would hold the property, the younger brothers would not thereby be excluded altogether. They had claim to a share; but the public opinion was against the assertion of such a claim.

Yet seniority of birth could not altogether be ignored. Even Āpastamba, who has rightly been characterised as a revolutionist² and who was indeed a great individualist,³ had to say that "after having gladdened the eldest son by choice portions of his wealth, a man should, during his life-time, divide his wealth equally amongst his sons." He admits that according to some the eldest alone inherits and in some countries "gold or black cattle, or black produce of the earth is the share of the eldest." But being of opinion that "the preference of the eldest son is forbidden by the Sastras" he declares that all sons who are virtuous do inherit. Thus Āpastamba, though opposed to the law of primogeniture, recommends that in dividing his property the father shall gladden the eldest son with some choice portion of his wealth. But all the ancient law-givers were not of the same opinion. Gautama, the earliest amongst them would tell us :

“ऊर्ध्वं पितुः पुत्रा ऋक्षं भजेरन् निवृत्ते रजसि मातुर्जीवति चेच्छति सर्वं वा पूर्वजस्येतरान् विभृयात् । पूर्ववद्भिर्भागे तु धर्मवृद्धिर्विंशतिभागे

¹ Rigveda, VII. 51, 2.

² Prof. Sarvadhikary, T.L.L. (2nd edition).

³ *Ibid.*

मिथुनसुभयतोद्दयुक्तो रथो गोवृषः काचखोरकूटवन्तामध्यमस्त्रानेकशेद
विर्धान्वायसी मृदमनोवृत्तं चतुष्पदाश्चैकैकं यवीयसः समश्चेतरत् सर्वं दृश्यी वा
पूर्वजः स्वादेकैकमितरेषामेकैकं वा घनरूपं काम्यं पूर्वं पूर्वी लभेत दशतः
पशूनां नैकशफः नैकशफानां वृषभोऽधिको ज्येष्ठस्य वृषभोऽधिका ज्येष्ठिनेत्यस्य
सर्पं वा ज्येष्ठिनेयेन यवीयसां प्रतिमादवासवर्गे भागविशेषः.....ब्राह्मणस्य
राजन्धपुत्रो ज्येष्ठो गुणसम्पन्नस्तुत्यांशभाक् ज्येष्ठांशहीनमन्यत् राजन्यावैश्चापुत्र-
समवाये स यथा ब्राह्मणोपुद्वेच ।”

“After the father's death, let the sons divide his estate, or, during his life-time, when the mother has ceased to menstruate, if he desires it ; or the whole estate may go to the first-born ; and he shall support the rest as a father. But in partition there is increase of spiritual merit. (The additional share) of the eldest son consists of a twentieth part of the estate, a male and a female (of animals with one row of front teeth such as cows), a carriage yoked with animals that have two rows of front teeth, and a bull. (The additional share) of the middle-most shall consist of the one-eyed, old horn-less and tail-less animals, if there are several. (The additional share) of the youngest shall consist of sheep, grain, iron utensils, a house, a cart yoked with oxen and one of each kind of other animals. All the remaining property shall be divided equally. Or let the eldest have two shares, and the rest one each ; or let them each take one kind of property, (selecting) according to seniority, what they desire, ten heads of animals ; but no one brother shall take ten one-hoofed beasts or ten slaves. (If a man has several wives) the additional share of the eldest son is one bull (in case he be born of a later married wife). But the eldest son being born of the first-married wife (shall have fifteen cows and one bull) ; or let the eldest son who is born of a later-married wife, share the estate equally with his younger brethren of the first-married wife ; or let the special shares be adjusted in each class of sons according to their mothers.”¹

¹ Gautama, XXIX.

This Ṛṣi also tells us

न भोजयेत् स्तेन-क्षीव-पतित-नास्तिक तद्वृत्ति वीरहापेदिधिपुदिधिपुपति
.....पित्रा चाकामेन विभक्तान् ।

Vasiṣṭha.

According to Vasiṣṭha :

ह्यंशं ज्येष्ठो हरेद् गवाक्षस्य चानुसदृशम् अजावयो गृहस्य कनिष्ठस्य काष्ठं
गां यवसं गृहोपकरणानि च मध्यमस्य...यदि ब्राह्मणस्य ब्राह्मणीचत्त्रियावैश्यासु
पुत्राः सुपुत्रांशं ब्राह्मण्याः पुत्रो हरेद् ह्यंशं राजन्यायाः पुत्रः सममितरे
विभजेरन् ॥

"The eldest receives two shares, and the best of the kine and horses. The goats, sheep, and the house belong to the youngest ; black iron, the utensils and furniture, to the second."...If a Brāhmaṇa have Brāhmaṇī, Kṣatriyā and Vaisyā wives, the son by Brāhmaṇī wife shall take three shares and that by Kṣatriyā, two, the rest taking equally.

Viṣṇu.

Viṣṇu tells us :

पिता चेत् पुत्रान् विभजेत् तस्य स्वेच्छा स्वयमुपात्तेऽर्थे पैतामहे त्वर्थे
'पितृपुत्रयोस्तुस्य' स्वामित्वम् । ... ब्राह्मणस्य चतुर्षु वर्णेषु चेत् पुत्रा भवेयुस्तो
पैतृकम् ऋक्थं दशधा विभजेयुः । तत्र ब्राह्मणीपुत्रश्चतुरोऽंशानादद्यात् ।
चत्त्रियापुत्र द्वौ हावंशी वैश्यापुत्रः । शूद्रापुत्रस्त्वेकम् । अथ चेच्छूद्रापुत्रवर्जं
ब्राह्मणस्य पुत्रद्वयं भवेत् तदा तदनं नवधा विभजेयुः । वर्णानुक्रमेण चतुर्षु-
दिभागैर्गतांशानादद्यात् । वैश्यवर्जमष्टधाकृतं चतुरक्षीनेकश्चादद्यात् । चत्त्रियवर्जं
सप्तधाकृतः चतुरो हावेकश्च । ब्राह्मणवर्जं षड्धाकृतं द्वौ हावेकश्च । चत्त्रियस्य
चत्त्रियावैश्याशूद्रापुत्रेष्वयमेव विभागः । अथ ब्राह्मणस्य ब्राह्मणचत्त्रियौ पुत्रौ
स्यातां तदा सप्तधाकृताश्चानाद् ब्राह्मणश्चतुरोऽंशानादद्यात् । द्वौ राजन्यः ।
अथ ब्राह्मणस्य ब्राह्मणवैश्यौ तदा षड्धाविभक्तस्य चतुरोऽंशान् ब्राह्मण
श्चादद्यात् । हावंशी वैश्यः । अथ ब्राह्मणस्य ब्राह्मणशूद्रौ पुत्रौ स्यातां तदनं
पञ्चधा विभजेयाताम् । चतुरोऽंशान् ब्राह्मणस्त्वादद्यात् एकं शूद्रः । अथ
ब्राह्मणस्य चत्त्रियस्य वा चत्त्रियवैश्यौ स्यातां तदा तदनं पञ्चधा विभजेयाताम् ।
द्वौ राजन्यः । अथ ब्राह्मणस्य चत्त्रियस्य वा चत्त्रियशूद्रौ पुत्रौ स्यातां तदा तदनं
चतुर्धा विभजेयाताम् । द्वौ राजन्यः ।

अभियस्वादव्यात् । एकं शूद्रः । अथ ब्राह्मणस्य क्षत्रियस्य वैश्यस्य वा वैश्यशूद्रौ पुत्री स्यातां तदा तद्धनं त्रिधा विभजेयाताम् । द्वावंशौ वैश्यस्वादव्यात् एकं शूद्रः । अथैकपुत्रा ब्राह्मणस्य ब्राह्मणक्षत्रियवैश्याः सर्व्वहराः । क्षत्रियस्य राजन्यवैश्यौ वैश्यस्य वैश्यः । शूद्रः शूद्रस्य । द्विजातीनां शूद्रस्त्वेकः पुत्रोऽर्धहरः । अपुत्रच्छत्रियस्य या गतिः सात्वार्षस्य द्वितीयस्य ।समवर्षापुत्राः समानंशानादव्युः । ज्येष्ठाय श्रेष्ठमुद्धारं दव्युः । यदि द्वौ ब्राह्मणौपुत्री स्यातामेकः शूद्रापुत्रस्तदा नवधाविभक्तस्वार्थस्य ब्राह्मणौपुत्रावष्टौ भागानादव्यातामेकं शूद्रापुत्रः । अथ शूद्रापुत्रावुभौ स्यातामेकौ ब्राह्मणौपुत्रस्तदा षड्धाविभक्तस्वार्थस्य चतुरोऽंशान् ब्राह्मणस्वादव्याद् द्वावंशौ शूद्रापुत्रौ । अनेन क्रमेणान्यत्राप्यंशकल्पना भवति ॥”¹

“If a father makes a partition with his sons, he may dispose of his self-acquired property as he thinks best. But in regard to wealth inherited of the paternal grandfather, the ownership of father and son is equal.....If there are four sons of a Brāhmaṇa (springing from four different wives) of the four castes, they shall divide the whole estate of their father into ten parts. Of these, let the son of the Brāhmaṇī wife take four parts; the son of the Kṣatriyā wife three parts; the son of the Sūdrā wife, a single part. Again, if there are three sons of a Brāhmaṇa (by wives of different castes), but no son by a Sūdrā among them, they shall divide the estate into nine parts. Of these let them take each in the order of his caste, shares amounting to four, three, and two parts of the whole respectively. If there is no Vaisya among them, they shall divide the estate into eight parts, and take four parts, three parts and one part respectively. If there is no Kṣatriya among them they shall divide it into seven parts, and take four parts, two parts and a single part respectively. If there is no Brāhmaṇa among them, they shall divide it into six parts, and take three parts, two parts and a single part respectively. If there are sons of a Kṣatriya by a Kṣatriyā, a Vaisyā and a Sūdrā wife the mode of division shall be the same.

¹ Viṣṇu Saṁhitā, XVII and XVIII.

Again if there are two sons of a Brāhmaṇa, the one belonging to the Brāhmaṇa and the other to the Kṣatriya caste, they shall divide the estate into seven parts, and of these the Brāhmaṇa son shall take four parts ; and the Kṣatriya son three parts. Again if there are two sons of a Brāhmaṇa and the one belongs to the Brāhmaṇa, and the other to the Vaisya caste, the estate shall be divided into six parts ; and of these, the Brāhmaṇa shall take four parts ; and the Vaisya, two parts. Again, if there are two sons of a Brāhmaṇa, and the one belongs to the Brāhmaṇa and the other to the Sūdra caste, they shall divide the estate into five parts ; and of these, the Brāhmaṇa shall take four parts ; and the Sūdra, a single part. Again, if there are two sons of a Brāhmaṇa, or a Kṣatriya, and the one belongs to the Kṣatriya and the other to the Vaisya caste, they shall divide the estate into five parts ; and of these, the Kṣatriya shall take three parts ; and the Vaisya, two parts. Again, if there are two sons of a Brāhmaṇa, or a Kṣatriya, and the one belongs to the Kṣatriya, and the other to the Sūdra caste, they shall divide the estate into four parts ; and of these, the Kṣatriya shall take three parts ; and the Sūdra, a single part. Again, if there are two sons of a Brāhmaṇa, or a Kṣatriya, or a Vaisya, and the one belongs to Vaisya, and the other to the Sūdra caste, they shall divide the estate into three parts ; of these, the Vaisya shall take two parts ; and the Sūdra, a single part. If a Brāhmaṇa has an only son, he shall take the whole estate, provided he be a Brāhmaṇa, Kṣatriya or Vaisya. If a Kṣatriya has either a Kṣatriya or Vaisya son the rule shall be the same. If a Vaisya has a Vaisya son only (the rule shall also be the same). (And so shall the only) son of a Sūdrā (be sole heir) to his Sūdra father. A Sūdra, who is the only son of a father belonging to a twice-born caste, shall inherit one half of his property ; the other half shall devolve in the same way as the property of one who died without leaving issue...Sons who are equal in caste shall receive equal shares. A best part shall be given to the eldest, as his additional share. If there are two sons of a Brāhmaṇi wife,

and one son by a Sūdrā wife, the estate shall be divided into nine parts ; and of these, the two sons of the Brāhmaṇī wife shall take eight parts, and the one son of the Sūdra wife, a single part. If there are two sons by a Sūdrā, and one son by a Brāhmaṇī wife, the estate shall be divided into six parts ; and of these, the son of the Brāhmaṇī wife shall take four parts, and the two sons of the Sūdrā wife together shall take two parts. Upon the same principles the shares have to be adjusted in other cases also.

According to *Viṣṇu*,

विभक्ताः सहजीवन्तो विभजेरन् पुनर्यदि ।

समस्तत्र विभागः स्वाण्येष्टं तत्र न विद्यते ॥ ¹

“ If (brothers), who after a previous division of the estate live again together as parceners, should make a second partition the shares must be equal in that cases and the eldest has no right to an additional share.” Baudhāyana ² enjoins that “ a man may divide his ancestral property equally amongst all his sons without difference; or he may reserve for the eldest the best part ; or the eldest may receive in excess one part out of ten and the rest may divide equally.” According to him “ if the partition takes place during the life-time of the father, the cows, horses, goats, and sheep will fall to the share of the eldest.”

Manu.

According to *Manu* ³

ऊर्ध्वं पितुश्च मातुश्च समेत्वं भ्रातरः समम् ।

भजेरन् पैष्टकं रिक्श्मनीशास्ते हि जीवतोः ॥

ज्येष्ठ एव तु गृह्णीयात् पितरं धनमशेषतः ।

शेषास्तुपुत्रीविर्युयैव पितरं तथा ॥ ⁴

¹ Viṣṇu, XVIII, 41.

² Baudhāyana, Praśna II, Kāṇḍa 2.

³ Manu, IX, 104, 105, 111 to 119.

⁴ Manu gives the following reason for his proposition :—

ज्येष्ठेन जातमात्रेण पुत्रीभवति मानवः ।

पितृशानपुत्रश्चैव स तज्यात् सर्वसर्पैति ॥

एवं सहवसेदुर्वा पृथग् वा धर्मकाम्बया ।
 पृथग् विवर्धते धर्मस्तस्माद्धर्मगा पृथक्क्रिया ॥
 ज्येष्ठस्य विंश ऊहारः सर्वद्रव्याश्च यद्वरम् ।
 ततोऽर्धं मध्यमस्य स्यात् तुरीयन्तु यवीयसः ॥
 ज्येष्ठश्चैव कनिष्ठश्च यत् हरेतां यद्योदितम् ।
 येऽन्ये ज्येष्ठकनिष्ठाभ्यां तेषां सगान् मध्यमं धनम् ॥
 सर्वेषां धनजातानामाददीताग्रमग्रजः ।
 यच्च सातिशयं किञ्चिद्दशतयापुयाद्वरम् ॥
 ऊहारो न दशस्वस्ति सम्पन्नानां स्वकर्मसु ।
 यत्किञ्चिदेव देयन्तु ज्यायसे मानवर्धनम् ॥
 एवं समुद्धृतोद्वारे समानंशान् प्रकल्पयेत् ।
 ऊहारोऽनुद्धृते तेषामियं स्वादंशकल्पना ॥
 एकाधिकां हरेज्येष्ठः पुत्रोऽर्धार्धं ततोऽनुजः ।
 अंशमंशं यवीयांस इति धर्मो व्यवस्थितः ॥
 भ्राजाविकां सैकशफं न जातु विषमं भजेत् ।
 भ्राजाविकान्तु विषमं ज्येष्ठस्यैव विधीयते ॥

"After the death of the father and of the mother, the brothers, being assembled, may divide among themselves in equal shares the paternal estate; for, they have no dominion while the parents live.

Or the eldest alone may take the whole paternal estate, the others shall live under him just as under their father.

यन्मिथुनं सन्नयति येन चानन्यमन्त्र ते ।

स एव धर्मजः पुनः कामजात्रितरान् विदुः ॥ (IX. 106-107.)

And it seems he traces primogeniture to some onerous origin, when he says :

पितैव पालयेत् पुत्रान् ज्येष्ठो भ्रातृन् यवीयसः ।

पुत्रवशापि वर्त्तन् ज्येष्ठे भ्रातरि धर्मतः ॥

ज्येष्ठः कुलं वर्धयति विनात्मपि वा पुनः ।

ज्येष्ठः पुण्यतमो लोके ज्येष्ठः सन्निरगर्हितः ॥

यो ज्येष्ठो ज्येष्ठवृत्तिः स्यात्प्रातिव स पितैव सः ।

अज्येष्ठवृत्तिर्यस्य स्यात् स सन्पूषु बन्धुवत् ॥ (IX. 108-110.)

Either let them thus live together, or apart, if each desires to gain spiritual merit ; for by their living separate their merit increases, hence separation is meritorious.

The additional share for the eldest shall be one twentieth and the best of all chattels ; for the middlemost, half of that ; but for the youngest, one-fourth.

Both the eldest and the youngest shall take according to the rule just stated ; those who are between the eldest and the youngest, shall have the share middlemost.

Among the goods of every kind the eldest shall take the best article, and even a single chattel which is particularly good, as well as the best of ten animals.

But among brothers equally skilled in their occupations, there is no additional share among ten, some trifle only shall be given to the eldest as a token of respect.

If additional shares are thus deducted, one must allot equal shares. But if no deduction is made the allotment of the shares among them shall be in the following manner :—

Let the eldest son take one share in excess, the brother born next after him one share and a half, the younger ones one share each ; thus the law is settled..

Let him never divide a single goat or sheep, or a single beast with uncloven hoofs ; it is prescribed that a single goat or sheep belongs to the eldest alone.

Manu seems to give us a rule of lineal primogeniture, and this seems to be the reason why he says :

यवीयान् ज्येष्ठभार्यायां पुत्रमुत्पादयेद् यदि ।

समस्तत्र विभागः स्वादिति धर्मो व्यवस्थितः ॥

“If a younger brother begets a son on the wife of the elder, the division must then be made equally, thus the law is settled.”

उपसर्जनं प्रधानस्य धर्मतो नोपपद्यते ।

पिता प्रधानं प्रपते तस्माद्धर्मेष तं भजेत् ॥¹

“The representative is not invested with the right of the principal; the begetter became the principal on procreation; hence one should give a share to him according to the rule.”

Manu also gives the rule of law to define the relative position of sons by different wives, and says :—

पुत्रः कनिष्ठो ज्येष्ठायां कनिष्ठायाश्च पूर्वजः ।

कार्यं तत्र विभागः स्यादिति चेत् संशयो भवेत् ॥

एकं वृषभमुद्धारं संहरेत स पूर्वजः ।

ततोऽपरे ज्येष्ठवृषास्तदूनानां स्वमादृतः ॥

ज्येष्ठस्तु जातो ज्येष्ठायां हरिद् वृषभषोडशाः ।

ततः स्वमादृतः शेषा भजेरन्निति धारणा ॥

सदृशक्षीषु जातानां पुत्राणामविशेषतः ।

न मादृतो ज्येष्ठमस्ति जन्मतो ज्येष्ठमुच्यते ॥

जन्मज्येष्ठेन धातानां सुब्रह्मण्यास्तपिष्मृतम् ।

यमयोश्चैव गर्भेषु जन्मतो ज्येष्ठता कृता ॥²

ब्राह्मणस्यानुपूर्व्येण चतसस्तु यदि क्षियः ।

तासां पुत्रेषु जातेषु विभागेऽयं विधिः स्मृतः ॥

कौनाशो गोवृषो यानमसृङ्गारश्च वैश्व च ।

विप्रस्यौदारिकं देयमेकांशश्च प्रधानतः ॥

त्रयंश्च दायादरेक्षिप्रो हार्वशी क्षत्रियास्तुतः ।

वैश्याजः सार्धमेवांशमंशं शूद्रास्ततोऽरेत् ॥

सर्वं वा रिक्त्यजातं तद्वशधा परिकल्प्य च ।

धर्म्यं विभागं कुर्वीत विधिनामेन धर्म्यवित् ॥

¹ Manu, IX, 120-121.

² Manu, IX, 122-126.

अतरोऽयम् इरेदिम सोमयम् अत्रिवाद्युतः ।

वेद्यायुतो इरेद् इमंमं मद्राद्युतो इरेत् ॥¹

समवर्षाद्यु ये जाताः सर्वे पुत्रादिजन्मनाम् ।

अष्टारं ज्ञायसे दत्त्वा भजेरचितरे समम् ॥²

“ If there be a doubt, how the division shall be made, in case the younger son is born of the elder wife and the elder son of the younger wife, (then the son) born of the first wife shall take as his additional share one (most excellent) bull; the next best bulls (shall belong) to those (who are) inferior on account of their mothers.

But the eldest (son, being) born of the eldest wife, shall receive fifteen cows and a bull; the other sons may then take shares according to (the seniority of) their mothers; that is a settled rule.

Between sons born of wives equal (in caste) (and) without (any other) distinction no seniority in right of the mother exists; seniority is declared (to be) according to birth.

And with respect to the Subrahmanya (texts) also it is recorded that the invocation (of Indra shall be made) by the first-born; of twins likewise (conceived at one time) in the wombs (of their mothers) the seniority is declared (to depend) on (actual) birth.

If there be four wives of a Brāhmaṇa in the direct order of the castes, the rule for the division (of the estate) among the sons born of them is as follows :—

The (slave) who tills (the field), the bull kept for impregnating cows, the vehicle, the ornaments, and the house shall be given as an additional portion to the Brāhmaṇa (son), and one most excellent share.

¹ Manu, IX, 149-153.

² Manu, IX, 156.

Let the son of the Brāhmanī (wife) take three shares of the (remainder of the) estate, the son of the Kshatriyā two, the son of the Vaisyā a share and a half, and the son of the Sudrā may take one share.

Or let him who knows the law make ten shares of the whole estate, and justly distribute them according to the following rule :—

The Brahmana (son) shall take four shares, the son of the Kshatriyā (wife) three, the son of the Vaisyā shall have two parts, and the son of the Sudrā may take one share.

All the sons of twice-born men, born of wives of the same caste, shall equally divide the estate, after the others have given to the eldest an additional share.

We would now turn to Yājñavalkya Samhitā and see how far the primogenitary rules are recorded by Yājñavalkya. The sage. Yājñavalkya draws a distinction between division worked out by father during his lifetime and that amongst brothers after father's demise, and informs us that :—

विभागश्चेत् पिता कुर्यात् स्वेच्छया विभजेद् सुतान् ।

ज्येष्ठं वा श्रेष्ठभागेन सर्वं वा स्युः समांशिनः ॥ ¹

यत्नस्त्वानीहमानस्य किञ्चिद्वा पृथक्क्रिया

न्यूनाधिकविभक्तानां धर्म्यः पितृकृतः स्मृतः ॥ ²

विभजेरन् सुताः पित्रोरुद्दृष्टव्यमर्थं समम् ।

मातुर्दुहितरः श्रेष्ठवृषास्ताभ्य ऋतेऽन्वयः ॥ ³

"When the father makes a partition, let him separate his sons at his pleasure, and give either the eldest the best share or (if he choose) all may share equally !"

¹ Yāj., II. 116.

² Yāj., II. 118.

³ Yāj., II. 119.

"The separation of one who is able to support himself and is not desirous of participation may be effected by giving him some trifle. A distribution, made by the father among sons separated with greater or less share, is pronounced to be legal."

"Let sons divide equally both the effects and the debts, after their parents. The daughters share the residue of their mother's property, after payment of her debts. And the issue succeeds in their default."

Yājñavalkya goes further and lays down :

यत्किञ्चित् पितरि म्रिते धनं ज्येष्ठोऽधिगच्छति ।

भागो यवीयसां तच्च यदि विद्यानुपासिनः ॥¹

"After the death of the father, if the eldest brother acquire any wealth, a share of that belongs to the younger brothers ; provided they have duly cultivated science."

As to sons born of wives belonging to different castes, Yājñavalkya practically repeats his predecessors and says :

चतुर्विधैकभागाः स्ववर्णशो ब्राह्मणात्मजाः ।

क्षत्रजाविधैकभागा विड् जास्तु द्वैकभागिनः ॥²

"The sons of a Brāhmana, in the several castes, have four shares, or three, or two or one ; the children of a Kṣatriya have three portions, or two, or one ; and those of a Vaisya take two parts or one."

According to Nārada³ "whether the father distribute equal shares to his sons or give more wealth to some and less to others, such shall be their shares ; for the father is the lord of all." "After father's death," he says, "let sons divide his wealth according to seniority. It should be known that the eldest

¹ Yāj., II. 122.

² Yāj., II. 128.

³ Colebrooke, 54.

receives a larger share upon partition after father's death, and it is recorded that the youngest receives a smaller one. The rest should take equal shares, and so should an unmarried sister."

It must not be forgotten that Nārada gives us a mere commentary of Manu Samhitā, and though Nārada Samhitā is supposed to be of date posterior to that of Yājñavalkya, it must not be inferred that here in Nārada we meet with a revival of the primogenitary rules.

Vrihaspati, another Samhitākār of the later years, gives us
 Vrihaspati. "two modes of partition among heirs: one with attention to priority of birth and the other with equality of allotment," and says that "the eldest, (or he who is pre-eminent) by birth, science, and virtuous qualities, shall receive (after the death of the father) two shares of the heritage and the rest shall share alike; but he is venerable like their father;"¹ and Kātyāyana tells us that "if a father, during his life, divide the property, he shall not prefer one of his sons, nor exclude one of them from a share, without a sufficient cause."

Here we might give the rules to be found in the celebrated
 Kautilya. Arthasāstra of Kautilya who² refers to the rules observed among the followers of Usanasa and says "in the absence of quadrupeds the eldest takes an additional share of one tenth of the whole property excepting precious stones. According to Kautilya, father's carriage and jewellery shall be the special share of the eldest: middlemost and youngest sons also should get some articles of the father. The whole property after deducting those things or including them may be equally divided among the sons. But an impotent eldest son shall have only $\frac{1}{3}$ of the special share usually given to an eldest son. An eldest son, following

¹ Colebrooke, 54.

² Kautilya, II. 6.

condemnable occupation or not observing religious duties shall have only $\frac{1}{4}$ of the special share. According to Kautilya, primogeniture is decided by birth. The share of the sons by wives of different castes will be the larger, the higher is the caste of the mother, provided the inter-marriage is of the permissible kind.¹ Kautilya further tells us that the disqualified sons are dependent on the eldest for their subsistence.

The extracts have been given in full in order to enable you to mark distinctly the gradual decline of the rule of primogeniture, and the rise and progress of the principle of equal distribution. These Samhitākārs proposed several modes of distribution. Professor Sarvadhikary is of opinion that the principle of equal distribution must have made considerable progress before the time of Gautama. Gautama indeed does not seem to favour the rule of primogeniture at all. According to him विभागे तु धर्मवृद्धिः—“there is an increase of spiritual merit in partition.” Professor Sarvadhikary² says, “This in substance is a strong recommendation to divide the heritage among the sons of the deceased, and is a clear indication of the inevitable decay of the principle of primogeniture. Let the eldest son, says Gautama, receive the whole estate, if the honour and prestige of the family must be maintained and if its corporate character cannot be destroyed. There is, however, a strong party in his time, who are staunch supporters of individual rights, and who would on no account suffer the first-born to monopolise the paternal property and tyrannise over his brethren. The spirit of liberty is abroad, and the reign of iron despotism is over. All the brothers, the sons of the same father, must be treated as equals, and the first-born must not be distinguished from his brethren.” The principle of equal distribution however could not have the full support of public

opinion and theories like “*ज्येष्ठेन जातमात्रेण पुत्री भवति मानवः*” still had great hold over the community and the eldest son could not at once be stripped of all honours. Various principles of distribution were advanced and the law of inheritance was anything but uniformly fixed. “Different groups of families adopted different laws of inheritance and followed different rules of division.” The rule of single succession lost its binding force; but no other uniform rule was substituted in its place. “The corporate rights of the family and the independent rights of the individual members would not coalesce. They were blended and modified, and at last, long after Gautama published his laws, the principle of primogeniture had to give up the struggle, and yield its place entirely to its rival principle.” We have seen how Yājñavalkya strongly advocated equality on partition of the paternal estate, and Mitāksharā condemns unequal partition as sinful.

It is indeed difficult to say what were the causes of the decline of the primogenitary rules. The very fact that the lawgivers had been in search for reasons to support primogeniture goes to show that people had already begun to question its propriety, and would not submit to it unless they are satisfied as to why there should be any preferential treatment of the first-born at all. Manu gives reasons and is of opinion that they are superior in merit, they are superior spiritually, and hence preference is due to them. This mode of thought gradually introduced others to be treated preferentially whose superiority also could not be ignored, and we find lawgivers placing superior in birth, science and virtuous qualities on an equal footing.

We have already noticed how our ancient lawgivers busy themselves with elaborating rules of law to regulate the relative positions of sons by different wives. The rules are really very significant and would lead one to think how far polygamy had a hand in the gradual decay of primogeniture. Gautama, we have seen, gives us three different rules for the purpose.

According to him the son of the first wife would have some special allotment, or may take equal share with his elder brother by step-mothers who are junior to his own mother ; or the seniority of the brothers would be determined by the seniority of their mothers. Further difficulty would arise when the different wives would not all be of the same caste, and Gautama gives us detailed rules regulating the relative position of the sons in such cases also. The influence of polygamy in shaping the subsequent history of primogeniture has been estimated by Prof. Sarvadhikary in the following terms : " At the time when Gautama was promulgating his rules of inheritance, a great evil, which is inseparable from the polygamous state of society, had become manifest. As soon as the old restraints were loosened, as soon as the family ceased to hold together, and the individual members freed themselves from the salutary subjection of the patriarch, the evils of the polygamy showed themselves. All the wives of the husband strove to secure his property for their own issues. The rule of primogeniture would have continued in full force for a very long time in India, had polygamy not existed in the country. Polygamy is adverse to the rule of hereditary succession. It requires no explanation to make it clear to you that, in polygamous societies, the form of primogeniture will always tend to vary. Many considerations may come into play in constituting a claim on the succession ; the rank of the mother, for example, or her degree in "the affections of the father." That the evil we speak of was creating important changes in the laws of the country, is sufficiently apparent from the language of the older legislators. The rivalry between the first-married wives was growing intense, and our legislator had no alternative but to soothe the irritated feelings of termagant wives, and to lay down that the shares of the paternal estate among the sons might be adjusted according to their different mothers." This is how Professor Sarvadhikary accounts for the decay of the primogenitary rules and it cannot be denied that there is much force in these remarks. Yet before

it was possible for these "termagant wives" to do what according to Prof. Sarvadhikary they did for their respective issues, it must have been possible for the husband to determine the succession to his estate, and as soon as that was possible, primogenitary rule must have already been in the wane. If the institution could stand the rivalry of wives of the different male members of an earlier joint family it seems hardly believable that the rivalry of co-wives would prove such a formidable foe.

If Gautama says "सर्वं वा पूर्वजस्येतरान् विहाय," no other lawgivers of that age seems to show any inclination to favour the exclusive right of the eldest son. They cannot indeed deny that some respect is due to priority in birth and would either allot an additional share or give a choice portion of the wealth to these prior-borns. The hard-and-fast rule of primogeniture has already become obnoxious and people have begun to question its propriety. Lawgivers are already called upon to support them by giving reasons and the one reason that suggests to them is some excellence, some superiority in the first-born. Objectors would perhaps ask what if any first-born would not have that superiority? Manu at once would answer "उदारो न दयस्वसि सम्पन्नान् सवर्णान्." Even then, however, he cannot deny that "यत्किञ्चिदेव देयम् ज्ञायसे मानवीयम्."¹ If the eldest son is not distinguished from others by pre-eminent learning or scientific skill his claim to any superior share or choice portion is gone. Such an eldest son is not, according to Manu, entitled to these additional shares. But even then some respect, however insignificant, is due to him on account of his priority in birth. We have seen how other lawgivers of the age think almost similarly and are obliged to point out that some difference in the treatment of the eldest son is prescribed by popular usage. Āpastamba, however, and after him Yājñavalkya, would not even allow these last vestiges of primogenitary rules to stand; and if Āpastamba was for giving to the

¹ Maun, IX, 115.

eldest son a present of some insignificant value, Yājñavalkya would make no distinction whatsoever and would enjoin "विभजेरन् सुताः पित्रोरुर्ध्वं कथञ्चनं समम्." The inequality which Yājñavalkya could think of was the one worked out by the father himself, and according to him :

“विभागश्चेत् पिताकुर्व्यात् स्वेच्छया विभजेत् सुतान् ।

ज्येष्ठं वा श्रेष्ठभागेन सर्व्वं वा स्युः समांशिनः ॥

* * * *

न्यूनाधिकविभक्तानां धर्म्यः पिद्वक्तः स्मृतः ॥”¹

The father may, during his life-time, dispose of his property among his sons in any way he thinks proper ; and this seems to point to a stage prior to the complete decay of primogeniture. As soon as it becomes possible for a father to do whatever he likes with his property, as soon as property acquires this individualistic character, the very essence of primogeniture is gone, and if polygamy could indeed work any havoc in the matter it must have been active after that. But the right which the father thus gradually acquired in his property and which caused the decay of primogeniture was not long countenanced, and very soon it became impossible for a father to wield it to work out inequalities. Kātyāyana would not allow a father to work out any inequalities whimsically : he would no longer be unrestrained in the exercise of choice : good and sufficient cause for such unusual departure from the prescribed rule must be shown.

One important question becomes pertinent at this stage. So long as it was open to fathers to make unequal division of the estate amongst their sons, it would be of supreme consequence to enquire if it was possible for them to make such divisions to take effect only after their death. Or in other words was it possible for them to exercise a sort of testamentary power ? The question whether the Hindus possessed

¹ Yaj. II, 116-118.

testamentary powers has very often been discussed, and there seems to be little controversy over the matter. We have already discussed many texts of the Vedic age which indicated father's power of disposal and distribution during his life-time ; but there is scarcely any material for saying that they ever enjoyed any testamentary power. In the corporate state of the family the exercise of power of disposal is naturally restricted, if not impossible ; but as soon as there was the slightest sign of the separation of the individual from the family, voluntary disposition of property became possible. But yet this was allowed only within a narrow limit. There is one instance in the whole of the Vedic literature where we find what we may take as an attempt at testamentary disposition, and we are told that the attempt failed. Reference has very often been made to the story of Nābhānedisto by various authors for the purpose of showing how property could be divided during the life-time of a father either by the father or by the sons themselves, perhaps when the father is old. It is however seldom noticed that the same story speaks of an attempt at a sort of testamentary disposal. He approached his brothers but they did not give him any share. He approached his father and his father could not, it seems, help him in getting a share. All that his father Manu could do was to advise him in the following terms :

“अङ्गिरसो वा इमे खर्गाय लोकाय सत्रमासते ते षष्ठं षष्ठमेवाहरागत्समुद्भूति
तानेते सूक्ते षष्ठेऽहनि शंसय तेषां यत् सहस्रं सत्र परिवेषणं तप्ते स्वर्यन्तो
दास्यन्तीति ।”¹

Nābhānedisto accordingly approached these Angiras and on these Angiras agreeing to leave him their properties he performed the sixth-day Yajña for them and they went to heaven.

“तं स्वर्यन्तोऽमुषजेतप्ते ब्राह्मणसहस्रमिति ।”

While going to heaven they left their property to Nābhānedisto saying these thousands are all yours, O Brāhmaṇa.

After the Angiras are gone to heaven Nābhānedisto proceeded to occupy the property when he was opposed by some one else.

“ तदेनं समार्कुवाणं पुरुषः कृष्णशवास्तुत्तरत उपोत्थाय चतुर्वीक्ष्य वा इदं मम वै वास्तुहमिति । सोऽब्रवीन्मह्यं वा इदमदुरिति । ”

The dispute was then referred to Manu, father of Nābhānedisto, who had to decide against his son : “ तं पिताब्रवीत् तस्यैव पुत्रकः ” It is indeed difficult to say why the transfer in favour of Nābhānedisto could not take effect. The only vitiating circumstance seems to be either that the gift was a *donatio moatis causa* or that it was to take effect only after the Angiras are dead.

When the family continued joint, when brothers chose not to come to a partition, it was the eldest of them who succeeded to the dignity of the patriarch. Manu, though of opinion that “ पृथग्विवर्धते धर्मस्तस्माद्धर्म्या पृथक्क्रिया, ” does not ignore the fact that very often brothers would perhaps live joint and says :

“ ज्येष्ठ एव तु गृह्णीयात् पितरं धनमशेषतः ।

शेषास्तमुपजीवेयुर्यथेव पितरं तथा । ”¹

He gives his own reasons for this proposition and says यो ज्येष्ठो ज्येष्ठवृत्तिः स्वाध्यातेव स पितेव सः.² Gautama also speaks of the same rule and says सर्वं वा पूर्वजस्येतरान् विभ्रयात् and he too is of opinion “ पूर्ववद्विभागे तु धर्मवृत्तिः ” According to Hārīta the eldest son may become the patriarch even in the life-time of the father, if the latter is decayed ; and when Sankha and Likhita say that even a younger son may be the patriarch if more qualified than his elder brother, the little of primogenitary rule that might have been left is done away with. It is not clear what would be the exact position of such a patriarch. Both Manu and Gautama seem

¹ Manu, IX, 105.

² Ibid, 110.

to lay down that such eldest brother shall take the entire estate, shall become the owner of the estate, only he shall take it subject to the charge of maintaining his younger brothers. It is however difficult to say what would be the position if the eldest brother would neglect to maintain the younger ones, or if the younger brothers would feel they are being neglected. Would not subsequent partition be possible? When are these brothers to exercise their choice? Manu at least seems to lay down that if the eldest brother would not properly behave, subsequent partition would be possible,¹ and अज्येष्ठदत्तिर्यस्य स्यात् स सम्पूज्यस्तु बन्धुवत्, and nothing more. Āpastamba refers to an opinion according to which the eldest son is the only heir; but he does not accept that as good law. Hārita and Sankha and Likhita declare him to be the manager only, the other brothers equally being the owner of the estate. Manu also seems to be of the same opinion; otherwise it will be meaningless to say:

यो ज्येष्ठो विनिकुर्वीत लोभाद् भ्रातृन् यवीयसः ।

सोऽज्येष्ठः स्यादभागश्च नियन्तव्यश्च राजभिः ॥

न चादत्त्वा कनिष्ठेभ्यो ज्येष्ठः कुर्वीत यौतुकम् ॥²

It appears that whether the family continues joint or not the eldest son has ceased to be looked upon as the sole owner of the estate. He may still be given the management of the household, but he is no other than a mere manager; and the right which the junior members have of maintenance is a real right given to them in lieu of their property kept in the hands of the manager. It is no moral duty, but a fully developed legal duty, and its non-fulfilment can be met with penalties.

¹ This seems to follow from Manu, IX, 204 :

यत्किञ्चित् पितरि देते धनं ज्येष्ठोऽपि न दत्ति ।

भानो यवीयसां तप इदि विद्यानुपाजिनः ॥

² Manu, IX, 213, 214.

The eldest son after such failure would have no claim to any special share in the subsequent partition. Some of these early lawgivers would connect the special share of the eldest with an invariable obligation on the part of such eldest sons to maintain those brothers who are disqualified for taking any share¹ and if these lawyers are correct the special share ceases to have the character of any privilege at all.

It becomes necessary for us to examine the land system of the period ; for there are texts which would seem to point to the fact that land was not always partible. The Dharma Sutras however are almost silent over the point, and individual property in land does not seem to have been fully recognized even during this period. The chapters on inheritance and succession in Dharma Sutras do not indeed speak of landed property. In none of them any mention of land is made in assigning additional share to the eldest sons.

Gautama teaches us that भूमि² cannot be sold and निधधिगमो राजधनं न ब्राह्मणस्याभिरूपस्याब्राह्मणो व्याख्यातः and [पष्ठं लभेतेत्येके³ According to him पशुभूमिस्त्रीषामनतिभोगः and पयि क्षेत्रेऽनादृते पालक्षेत्रिकयोः. But all these may refer only to the present occupation of land without having any property or ownership in the soil. According to Kautilya all lands belong to the king who makes a grant of them to the people.⁴ This gift, according to Kautilya, is made only for life and for restricted purpose.⁵ If those to whom it is given would neglect to cultivate then the king would be entitled to resume it

¹ See Kautilya.

² Gautama, VII : भूमिं ब्रीहियवाजाम्यव चपमधैवमनुष्यदेके ।

³ *Ibid*, X.

⁴ Kautilya, II, i : क्षत्रियाचार्य-पुरोहित-श्रीमिश्रेभ्यो ब्रह्मद्वैयावदक्षरस्याभिरुपदायकानि प्रयच्छेत् ।

⁵ *Ibid*, कारद्वैयः क्षत्रदेवाचार्य-पुरोहितादि प्रयच्छेत् ।

and make a fresh gift to others : अक्षपतामाप्तिष्यान्धः प्रयच्छेत्¹; or these resumed lands may be cultivated by village labourers : ग्रामभूतकवैदेहको वा क्षत्रियः. Such persons who take the lands as gift from the king would not naturally have much right of disposal, and Kautilya tells us “करदाः करदेष्वाधानं विक्रयं वा कुर्व्युः । ब्रह्मदेयिका ब्रह्मदेयिकेषु अन्यथा पूर्वसाहसदण्डः ॥”² They can transfer the property only to another of their own class. The right of alienation is thus restricted without much latitude in the choice of the transferee. Though land is thus theoretically granted for the life of the first taker, Kautilya recognizes right of heirs to inherit the land³ and we are told that in case a man would die leaving minor sons, elders among the villagers shall improve the property of such bereaved minor till the latter attains the age of majority.⁴ Unprepared lands cannot be taken away from those who are preparing them for cultivation⁵ and even according to Kautilya interest in land cannot be lost by adverse possession.⁶ Though it has been said that king was the owner of all land and no private individual had anything more than a mere right to hold it on condition of his bringing it to cultivation, there are rules which would go to show that a sort of limited individual interest in land was recognised even in these early days. We are told in Kautilya that rich persons among kinsmen or neighbours may in succession proceed to purchase the land and other holdings. Forty more neighbours other than the purchaser shall congregate in front of the holding for sale, and announce it as such. If on crying aloud “who will purchase this at such and such a price” no opposition

¹ Kautilya, II, i.

² *Ibid*, III, 10 ; see also III, 9.

³ *Ibid*, II, i & III, 5.

⁴ *Ibid*, II, i.

⁵ अक्षपति कर्तुं नो नादेयात्—Kautilya, II, i.

⁶ Kautilya III, 10 ; III, 16.

is offered, the purchaser may proceed to purchase. When it is thus announced that the holding is going to be sold at such a price any one of the neighbours may offer to purchase it at that price. Even after this stage when the purchaser proceeds to purchase, the assembled neighbours may also bid for the land and it is sold to the highest bidder.¹

It will be interesting to notice here that these holders of land had not only to pay rent to the king : there seems also to have been some military duty attached to it, and Kautilya cites his teacher in support of the proposition that "land occupied by a high-born person is very productive" for it supplies men to the army : अभिजातोपकृता भूमिः महाफलाप्यायुधौयोपकारिणी ।"²

Kautilya speaks of a sort of record of rights kept by the government. Plots of grounds as cultivated, uncultivated, plains, wet lands, gardens, etc., are kept recorded by the revenue-collector who also registers gifts, sales, charities, etc. : तेन च सौम्या चेन्नाणां च मर्यादारण्यपथि प्रमाण-सम्प्रदान-विक्रयानुग्रह-परिहार-निबन्धान् कारयेत् ।³

From all that has been collected from Kautilya a sort of village system seems to have been prevalent in those days, and in the Dharma Sutras and Smritis of the age we find mention of many village officers. Manu tells us how property in land can be acquired and we are told "स्याणुच्छेदस्य केदारमाहुः शल्यवतो मृगम्." There are indeed texts which appear to recognize a right beyond that of the community ; but it is not clear whether such right is in the individual or in the family. It is significant that while speaking of boundary disputes Manu

¹ Kautilya, III, 9.

ज्ञातिसामन्तपणिकाः क्लृप्तेषु भूमिपरिवहान् क्रेतुमभ्यासयेयुः । ततोऽन्ये वाच्या सामन्त-चत्वारिंशत्-कुल्या गृहप्रतिपुच्छे वैशम्पायनयेयुः । सामन्त गुणगृहेषु चैवमारानं सेतुमन्त्रं तद्वानमाचारं वा मर्यादासु यथा सेतुमानं चनेनापेक्ष कः क्रेता इति निरावृण्वित वीतमभ्यासतं क्रेता क्रेतुं क्षमेत ।.....सुर्गवायोर्वा मूल्यवर्पणे मूल्यगृहिः सगुल्याकोर्ध्वं गच्छेत् । विक्रयप्रतिक्रीडागुल्यं दद्यात् ।

² Kautilya, VIII, 4.

³ *Ibid*, II, 4.

could only think of dispute between two neighbouring villages. "सीमां प्रति समुत्पन्ने विवादे ग्रामयोर्द्वयोः" says Manu ज्यैष्ठेमासि नयेत् सीमां सुप्रकाशेषु सेतुषु ।¹ He is fully alive to the fact that people very often would quarrel over the boundary, and says, सीमां नानि नृणां वीक्ष्य नित्यं लोके विपर्ययम् ।² Yet it never strikes him that individual members of the same village or family may have similar disputes over the boundaries of their respective plots.

It is however difficult to say that no individual right was recognized in land. Kautilya gives ample evidence of this individual right which, as we have seen, was also saleable. Even Gautama speaks of mortgage of lands.³ However that be, there is hardly any material for us for saying how succession to these were governed in those early days. Usanasa tells us that land was impartible. If so, perhaps the eldest son would take it subject to the charge of maintaining the junior members. Vrihaspati restricts this rule of impartibility to a particular class of lands that were held for some special purpose in lieu of some service to be rendered by the holder. Here the rule of primogeniture indeed might find a fertile field for its growth. But the atmosphere seems to have been too hot for the purpose and even here primogeniture did not develop.

But what was the rule of succession to principalities in these early days? It is generally believed that
Rule of succession to principalities. principalities being in the main political offices, succession to them have always been governed by some such rule as primogeniture.⁴ Perhaps its assertion is mainly correct. Yet when we look to these early texts we are very often told otherwise. Mahābhārata gives numerous accounts of early subdivision of principalities. King

¹ Manu, VIII, 245.

² *Ibid*, 249.

³ Gautama, XII. पश्यन्महीनक्षेत्रं वसतवास्तेषु नातिपचयुचम् ।

⁴ Phillips in his T. L. L. considers that succession in Zemindaries by primogeniture points to their descent from ancient Rajs (p, 64.)

Vasu, we are told, subdivided his kingdom into five independent principalities and gave them to his sons. Rāmāyana also repeats such stories and Rāma himself divided his kingdom among his sons and nephews. Kings thus professed to have a sort of ownership in the principality, and perhaps in this respect at least followed humble examples from private lives. Besides kings have already acquired a right to nominate their successors. The story of Sakuntalā and Dusmanta may be referred to for the purpose, and the whole conversation of Sakuntalā and the king is significant in this respect. There we find clear indication of the king's power to nominate his successor. We have elsewhere remarked how the institution of Yuvarāj was in its inception only a means to elude election by people. The reigning king would associate one of his sons, usually the eldest, in the management of the Raj, and when such a son proves his worth or already gains in power by this association it becomes difficult for the people to overlook his claim and elect any other.¹ Gradually the institution supersedes election, and if the reigning king thus succeeds in eluding the right of election by people, the eldest son also gains a right to succession by the same insidious process. A custom develops in his favour, and when king Dasaratha is obliged to supersede the claim of Rāma in favour of Bharata everyone urges only a contrary custom in the family. It is indeed significant that none says a word about Rāma's *right* to be a Yuvarāj. That kings had power to appoint a younger son seems to be borne out by sufficient materials in these early texts. The story of Yayāti and Devayāni as given in the Mahābhārata points to the same conclusion.

Cf. Russian Law of Royal Succession.

CHAPTER VII

THE HISTORY OF PRIMOGENITURE IN INDIA UNDER THE MAHOMEDAN RULE.

The Hon'ble George C. Brodrick ¹ may not be correct in his characterization of primogeniture as essentially a Feudal Institution, and Professor Maitland ² may be fully justified in remarking that " Feudalism is a good word and will cover a multitude of ignorances;" yet it cannot be denied that Feudalism had some hand, at some stage at least, in the development of the institution. This feudal system is indeed no invention of the Middle Ages; it is the almost necessary result of the hereditary character of the Indo-Germanic institutions, when the tribe takes the position of dominant conquerors.³ This tendency to establish a Feudal system, almost similar to that which prevailed in Europe is indeed traceable among all the tribes of Indo-Germanic blood which have conquered and ruled Indian Provinces. It is traceable in Rajpootana; and the Mahrattas and Sikhs had both established a similar system. Kautilya,⁴ the great Hindoo politician, says "अभिजातोपस्था भूमिः महाफलाप्यायुधीयोपकारिणी."

But the Mahomedan genius was opposed to the feudal system. The Mahomedan system of government was throughout a non-hereditary or rather an antihereditary one, while the Hindoo system was essentially hereditary. A system of government

Mahomedan genius
opposed to Feudal
system.

¹ System of Land Tenure, Cobden Club Essay, p. 95.

² Collected Papers, Vol. I, p. 175.

³ Cobden Club Essay, p. 148.

⁴ " Land occupied by a high-born person is very productive, as it supplies men to the army."—Kautilya (Vol. VIII, 4).

which was opposed to hereditary offices, would naturally tend to become a highly centralised one, and the genius of such a centralised government was entirely opposed to any feudal system where officers would succeed to their office simply by descent.¹ Mahomedan conquest of India, therefore, gave rise to a struggle between these two opposite principles, and the Hindoo system ceased to develop and tended to decay under the Mahomedan rule. In the days when the Mahomedan rule was vigorous there was little intermediate tenures between the state and the people; every intermediate man was only an officer of the Crown. But the ancient Hindoo system could survive in those Rajpoot states which were indulgently permitted to retain a self-governed position as tributaries, and among some border tribes never thoroughly subdued.

On the fall of the Mahomedan rule the system partially re-developed in the Hindoo states which had a brief independent existence between the fall of the Mahomedan and the rise of the British power. These are but very few; and we shall miss an important link if we fail to examine the system prevailing in India on the eve of the Mahomedan conquest.

Rajpootana seems to have been little influenced by the Mahomedan anti-feudal principle, and what-
Rajpootana retains pre-Mahomedan institutions. ever institution we shall meet with here may give us an account of its predecessor in pre-Mahomedan days. We have seen that in the ancient Brahmanical accounts of our Hindoo institutions district officers are mentioned who seem to have filled much the same position in larger areas which the village headman fills in villages. They were lords of one thousand, of one hundred, or of ten villages,

¹ Phillips, T. L. L., p. 42. Also Cobden Club Essay, p. 148.

and were apparently hereditary officers.¹ On the eve of the the Mahomedan conquest the village system indeed was the one prevalent throughout India. No doubt the Brahmanical theory was in a way in favour of cultivator's proprietary right in the soil, at least in the surface.² But they had to pay rent to the king and such rent was payable in kind. "The collection of a tax of grain in kind demanded the employment of a great number of officers and under any other than the system adopted, their allowance would have taken up the greater portion of the revenue. The legislator, however, seems to have been fully aware that the agency of individuals employed in the vicinity of their homes may be purchased at a cheaper rate than when

¹ Cf. Manu, VII, 115-119:

यामस्याधिपतिं कुर्याद्दशयामपतिं तथा ।
 विंशतीशं शतेश्च सङ्ख्यपतिमेव च ॥
 यामि दोषान् समुत्पन्नान् यामिकाः शनकैः स्वयम् ।
 शंसिद् यामदशेशाय दशेशो विंशतीशमि ॥
 विंशतीशस्तु तं सर्व्वं शतेशाय निवेदयेत् ।
 शंसिद् यामशतेशस्तु सङ्ख्यपतये स्वयम् ॥
 यानि राज-प्रदेयानि प्रत्यहं यामवासिभिः ।
 चक्षपानिन्धनादीनि यामिकास्तान्यवाप्नुयात् ॥
 दशो कुलस्तु भुञ्जीत द्विशो पञ्च कुलानि च ।
 यामं यामशताध्यक्षः सङ्ख्यपतिः पुरम् ॥

² Cf. Manu, IX, 44:

प्रथेयमानां प्रथिवीं भार्यां पूर्व्वविदो विदुः ।
 स्वावच्छेदस्य केदारनाडुः शल्यवती वनम् ॥

Private property in land seems to be evident from boundary disputes mentioned in Yājñavalkya II, 153-161. Compare and contrast Manu VIII, 245-265. Notice that Manu speaks of dispute over boundary between two villages only, whilst Yājñavalkya contemplates such dispute between owners of two adjoining fields. See Vasistha, XVI. As to sub-soil right see Manu, VIII, 39:

निधीनान् पुराणानां धातुधानिव च चित्ती ।
 सर्व्वमान रचयाम्नाजा भूमिरधिपतिर्हि सः ॥

See also Gautama, "निष्पद्यमानो राजपणम्" Vasistha, XVI. Visnu Yājñavalkya, II, 35-36.

their duty calls them to a distance from their families. The public officers of revenue and police in each district were, accordingly selected from among the proprietors of the immediate neighbourhood.¹

We have already observed what Manu says of these officers, and what remuneration was payable to them. Halhed says, "These officers, denominated gram-Adhipati, were appointed in every parish and were amenable to overseers of ten parishes, who were under the direction of Superintendents, whose jurisdiction extended over 20 parishes, who were subject to the authority of Presidents of districts containing 100 parishes, who in their turn, were subordinate to governors of Provinces consisting of a thousand parishes." Halhed then continues,² "As the most numerous class of the Hindu population, that of the Sudras, was declared incapable of possessing any property whatever, it follows that no member of it could be a land-holder under the ancient Hindu Governments. The proprietary interest in the soil was vested in the Brahmins, Khetres and Byres, and the Burrna Shunker or intermediate class, under the original Hindu Government."³

The Brahmins and Khetries, considering manual labour as inconsistent with their dignity,⁴ and, to a certain extent, with their religious purity, avoided all personal interference with

¹ Halhed, Memoirs., etc., p. 6.

² Halhed, Memoirs, pp. 9-11.

³ Cf. Vasistha II:—वट् कर्माणि ब्राह्मणस्याध्ययनमध्यापनं यजनं दानं दानं प्रतिपद्यतेति । श्रीच राजन्यस्याध्ययनं यजनं दानम् आस्तेषु च प्रजापालनं स्वधर्मकेन जीवेत् । एतान्येव श्रीच वैश्यस्य कृषिवाणिज्यपाशुपाल्यकुसीदश्च । एतेषां परिचर्या शुद्रस्य । अनियता हस्तिरनियतकिम्बेद्याः सर्वेषां मुक्तसिखावर्जम् । अजीवतः स्वधर्मोपायतराम् पापीयसीं हस्तिनातिष्ठेरन् नतु कदाचित् पापीयसीम् ।

Gautama X:—दिजातोनामध्ययनमिज्या दानं.....वैश्यस्याधिकं कृषिवणिक्-पाशुपाल्य-कुसीदम् । शुद्रश्चतुर्थो वर्षे एकजातिसत्यापि सत्यमक्रोधः । श्रीचमाचमनार्थं पाणिपाद-प्रस्नानमेवेति ब्राह्मणधर्मसमरसं सद्वारहसिः परिचर्या.....

Manu IV and X, 76-129. Yājñavalkya.

⁴ Cf. Manu, X, 84:—कृषिं क्षात्रिणो मन्त्र्यो वा हस्तिः सविगर्हिता ।

भूमिं भूमिज्जादेव हस्तिः क्षात्रमयोमुक्तम् ॥

agricultural operations as degrading and even sinful, and not to be resorted to except in cases of extreme necessity; but they had no objection to profit by the advantages afforded by landed possessions, and were content to realize all the benefit which the legislator would seem (by declaring agriculture as a profession, their peculiar calling), originally to have designed to secure to the Byre caste, by imposing on their Sudra servants and slaves the labours of tillage, while they appropriated the crops."

It will be interesting to notice here that though it is now admitted on all hands that once the village system was universal throughout the country, Manu, the great law-giver, who has practically embraced all subjects of legislation, has scarcely laid down any rule for the internal economy of villages and towns. Whatever inferences as to the prevalence of the village system in the days of Manu may be drawn from the fact, it can hardly be denied that such a system prevailed in India on the eve of the Mahomedan conquest. Each village in India contained within itself the seeds of an entire republic or government. "Wars, deluges, pestilence, or famine may break it up for a time, but it has a tendency to re-unite which nothing can prevent."¹ Lieutenant-Colonel Briggs² while speaking of the existent village system, says, "It consists of an agricultural corporation, owning all the land, at the head of whom is a chief elected by the corporation. It has at least one individual of all the crafts necessary to agriculture and essential to the comforts of rural life. . . . The land belonging to every township is accurately defined, and the village officers abovementioned are retained on the spot by the assignment of a portion of it to each. These lots are usually situated on the borders of the village limits, in order to give to the hereditary officers a perfect knowledge, under all circumstances, of the boundary of

¹ Lt.-Col. Briggs, *Land-tax in India*, p. 35.

² *Ibid.*

the township. . . . The Government portion was originally paid in kind, and its amount was taken from the gross produce, estimated according to the quantity of seed sown, or according to the actual crop. Each cultivator also contributed something as fees to all the village officers who received these fees in addition to the lands they occupied free of tax to the King." Briggs then names gram-Adhikar, gram-lekuk, desadhikur and deslekuk as the several officers, some of villages, and some of districts consisting of several such villages.

We have already observed how in proportion as the central Mahomedan power declined, old systems revived; and you all know such revival would be expected in the Deccan. Speaking of this Deccan, Lieutenant-Colonel Briggs¹ says, "In whatever point of view we examine the native government in the Deccan, the first and most important feature is the division into villages or townships. These communities contain in miniature all the materials of a state within themselves, and are sufficient to protect their members if all other governments were withdrawn. Each village has a portion of ground attached to it, which is committed to the management of the inhabitants. The boundaries are carefully marked and jealously guarded. They are divided into fields, the limits of which are exactly known, each field has a name, and is kept distinct, even when the cultivation of it has been long abandoned. The result of the several reports received from Mr. Elphinstone is his conviction 'that a large portion of the ryots (cultivators) are the proprietors of their estates, subject to the payment of a fixed land-tax to Government that their property is hereditary and saleable, and they are never dispossessed while they pay their tax; and even then they have for a long period (at least thirty years) the right of reclaiming their estate on paying the dues of Government.'

Revival of pre-Moslem institutions in Deccan.

¹ *Ibid*, p. 41.

Again, an opinion prevails throughout the Mahratta country that under the old Hindu Government all the land were held by (meerassies) *hereditary landlords* and that the oopries (tenants) were introduced as the old proprietors sunk under the tyranny of the Mahomedans. The Collector of Poona states, that the general division of husbandmen are two: tulkaries, men who cultivate their own fields; and oopries, or tenants who cultivate lands not their own. A third class exists, called wandkary, a temporary tenant, who, residing in one village comes for a season to take land in another. The tulkary is a mirasdar, Tul signifies a field, and tulkary, the owner of land. He is considered, and universally acknowledged by the government, to have the property of the lands he cultivates."

The patel or chief of the landed corporation was the head of the village and the representative of the people as well as of the Government. Elphinstone thus describes the existence of the local officers in the Mahratta country: "A turuf is composed of an indefinite number of villages; it is under no particular officer. Several turufs make a Pergunnah, which is under a *desmook* (literally chief of the district) who performs the same functions towards the pergunnah as the Patel towards the village. He is assisted by a despandia (writer of the district) who answers to the Kool Kurney or village registrar." These 'desmooks and despandias are universally believed in the Mahratta country, as being officers appointed by some former government; they were perhaps the revenue officers of the Hindu Government.¹ These officers still hold the lands and fees that were originally assigned to them as wages; only the offices have been hereditary.

The picture of the village system given for the Deccan is the same as in Rajpootana, with this modification that the Hindu landholders who constituted the hereditary village landed proprietary paid revenue not to the king, but to some

¹ Cobden Club Essay, p. 163.

feudal superior to whom the revenue had been assigned as a reward for services, or as a provision for the support of military establishment.

In Rajpootana also Patel was the ancient *gramin* who was originally elected by the villagers and was the headman of the village. This Patel or *gramin* used to represent his village in all matters and he alone was responsible to others for the liabilities of the village. He was in fact the one bond between the king and the cultivators; and when the Marhattas attacked Rajpootana it was these Patels who used to be imprisoned till they could satisfy the plunderers by paying what these considered as due from the village.¹

These Patels have no doubt had their own ancestral lands or *Bapota*. But besides these they would have some lands given to them as Patel, and gradually when they succeeded in making their office hereditary the distinction was hardly kept in mind.

We have already referred to the feudal system of Rajpootana. That there was such a system prevalent in Rajpootana is borne out by ample evidence. In fact the entire military organization of the country was based on this system; the sardars and samantas were all bound to render military service, because for this they were given landed estates. The introduction of soldiers paid in money is ascribed to one Jagadhar, friend and adviser of Bijoy Singh of Marbar; and it is said that Jagadhar had to devise this means in order to counteract the influence of feudal sardars who were intriguing against Bijoy.²

¹ See Tod's Rajasthan.

Notice how these facts gradually made these Patels more powerful.

² Tod, Rajasthan, Marbar. These were called 'Saindhabi soldiers.'

The system prevalent seems to have placed Samantas as chiefs of subordinate principalities. They were almost absolute monarchs in their own principalities; only they had to render military service to their emperor, the Rana, and theoretically at least might lose the principality if Rana desired to resume it.¹ The Samanta would divide his principality into districts and villages and give these to Sardars who in their turn would be liable to render military service to the Samanta. The Rana seems to have retained some control even in the internal management of these principalities; but we do not know the exact nature of this interference.²

Primogeniture seems to have been the rule of succession in these principalities and in the states held by the Sardars. In fact the feudal system of Rajpootana has sometimes been appraised as the result of this rule of succession to principalities. When the eldest brother succeeds to the principality the younger ones are given landed estates and must be Samantas or Sardars to their eldest brother.

That Primogeniture was the rule of succession to principalities is evident to any one who reads the history of Rajpootana. Yet the reigning chief seems to have had some right in the selection of his successor. We are told that King Khomān retired from kingship and made his youngest son Jagaraj king at the advice of the Brahmins of his kingdom.³ Ananga Pal, King of Delhi, similarly placed Prithviraj on the throne in supersession, it seems, of the claim of Joychand.⁴ Samar Singh, brother-in-law of this Prithviraj and King of Chitore, placed the charge of his kingdom in the hands of his youngest son Karna while he was called upon to come

¹ *Ibid*, see pp. 190, 229, 286-288, 293, 432.

² *Ibid*.

³ Tod, Rajasthan.

⁴ *Ibid*.

in aid of Prithvi against the Moslem attack of India.¹ On this, Samar's eldest son left Chitore for good and his another son went to Nepal and became the founder of the Gilhote branch of the Rajpoots. You know the story of Padmini and of Alauddin's attack of Chitore, and how Lakshman Singh, the then king, had to make his twelve sons kings in succession. The rule of succession prevalent in Rajpoot principalities was one of lineal primogeniture.² Yet Lakshman Singh placed after Arisingh, his own third son and not Arisingh's eldest son on the throne.³ Then again King Ajoy Singh, the second son of Lakshman Singh, who alone of the sons of Lakshman was spared in the war against Alauddin, was placed on the throne in supersession of the claim of Arisingh's son and he in his turn⁴ placed the *rājtikā* on the forehead of Hamir, son of Arisingh, ignoring the claim of his own son Ajin Singh.⁵ You know the story of Chanda; how Chanda was made to promise to his father Lakshman Singh that if Lakshman Singh would have a son born of the womb of the Marbar princess that son would be king and Chanda would be his Samanta.⁶ Lakshman Singh had such a son and this son Mukul, though younger, ascended the throne. This also took place during the life-time of Lakshman Singh, who placed Mukul on the throne and retired to the forests.

¹ Tod, Rajasthan.

² See succession to Surjamalla. Surjamalla of Marbar had five sons, Bharga being the eldest. Bharga died during the lifetime of his father leaving a son Ganga. This Ganga succeeded Surjamalla though his uncles were alive.

³ Tod, Rajasthan.

⁴ *Ibid.*

⁵ Marhatta Sivaji was a descendant of this Ajin Singh. See Tod, Rajasthan.

⁶ Tod, Rajasthan.

It is needless to multiply examples. In all these cases however the former king was still alive and ^{Property in the throne.} it seems, a sort of property in throne was recognised in the king who thus was able to dispose of it as he chose. On his death, however, the succession seems ordinarily to have been governed by the rule of primogeniture. There are however cases which would go to show that even here the reigning prince might have some control. We are told that Rana Uday Singh had twenty-four sons and he selected his youngest son Jagamal to be his successor after death. He made this selection a few days before his death; but Jagamal was to succeed only after Uday Singh's demise.¹ The Sardars and Samantas did not however submit to this selection and though Jagamal became king after Uday Singh, he was soon dethroned by the Sardars and the famous Pratab Singh, his eldest brother, was placed on the throne.²

The story of Bhim Singh might be mentioned here to show that the rule of primogeniture in royal succession was the rule. Rana Raj Singh had two queens; Bhim Singh though born first was born of the less favourite one, Joy Singh being born of the favourite queen. Raj Singh wished that his younger son Joy Singh should be king after him; but the rule of primogeniture stood in the way. He contrived to make his eldest son Bhim Singh take an oath that he would not stand in the way of his younger brother, and if Joy Singh succeeded to the throne it was only because true to his words, Bhim gave up the throne.³

It will be interesting to notice here that while the Moghul

¹ Tod, Rajasthan.

² Pratab made several new grants of landed property for military purposes.—Tod, Rajasthan. See also how Vinsore was conquered by Sakta Singha and how Pratab gave it to Sakta as a fief (बुझिनि).

³ Tod.

empire was on its wane, the three Rajpoot Kingdoms of Mibar, Marbar and Ambar formed an alliance and signed a treaty of which some of the terms were not in keeping with the primogenitary rules. Ambar and Marbar, you know, had marriage alliance with the Moghul emperors. This lowered them in the estimation of true Rajpoots, and the Rana of Mibar would never have any matrimonial connection with these families. On the decline of the Moghul rule, Ambar and Marbar found out their folly, and, anxious to regain their lost social position, gave up the Moghul cause, and came to Rana Amar of Udoypur. The Rathore and Kusabaha, after a long time, regained their position by swearing that never hereafter would they have any connection—political or matrimonial—with the Moghuls. By the treaty it was settled that if any girl of the Shishodiya family be given in marriage in the family of these Rathore and Kusabaha chiefs, sons born of such princess shall ascend the throne of those chiefs.¹ This no doubt was not at all consistent with the custom of primogeniture prevailing in these principalities, and students of history know what amount of disorder and dispute was due to this attempt at variation of the rule.²

We have hitherto spoken of military fiefs of Rajpootana. But services of other kinds also used to be paid in land. We should only mention the 'thuá' lands of Mibar and the 'thuadars.' These thuadars were also looked upon as officers of the king having specified duties assigned to them.³ Ministers and the civil servants also held fiefs for their services. All these offices were necessarily impartible and must have originally been non-heritable also. Gradually however we find most of these heritable, though still impartible: and following the example of regal succession, primogeniture

¹ Tod, Rajasthan.

See also the several letters written by several chiefs to the Rana.

² *Ibid.* See the trouble over *Madhu Singh's* succession.

³ Cf. Sangram Singh's account given in Tod's Rajasthan.

seems to have been adopted as the rule of succession in them.

It will not be out of place here to notice that the Chiefs, Sardars and Samantas had power of adoption and their adopted son was a recognised substitute in cases of succession. We hear of such adoption having been made by the widow of Sardar Mahasingh of Pokarna and we know what troubles followed this adoption. Similarly Sakta Singh, brother of Pratab Singh, was adopted by the chief of Salumbra. This Salumbra chief subsequently had sons born of his own body and we are told that by this subsequent birth of a son of the body, Sakta Singh was debarred from succeeding to the chiefship. The adopted son's position was thus very precarious when the estate was impartible.

We have seen how during the reign of Lakshman Singh, his sons had to become temporary kings so that they might satisfy the Goddess of Chitore by sacrificing their royal blood in war against Alauddin. Once again when Sangram Singh's infant son ascended the throne, the same Goddess had to be pleased by the same contrivances. Bahadur Shah of Gujrat attacked Chitore, his motive being almost similar to that of Alauddin. The Sardars and Samantas after a prolonged debate arrived at the conclusion that a temporary king must ascend the throne and sacrifice himself before the Goddess: otherwise Chitore cannot be saved. Devalraj Baghji agreed thus to sacrifice his life and became the temporary king. These stories really remind us of Dr. Frazer's substitute kings and point to the onerous responsibilities of early kings.

* Rajpoot law of primogeniture ensures an immutable right of the eldest son. And we have seen how fathers desirous of securing the throne to their favourite younger sons, in most cases, by more favourite wives, can do that only when the eldest voluntarily relinquishes his claim. Yet this immutable right seems to have been only a matter of custom. Vestiges of earlier power of the

Rajpoot Law of
Primogeniture.

father to supersede the eldest are not wanting in the annals of Rajasthan. We have heard many stories of selection by the reigning chief and in one instance we have been given an account of a custom by which the father is required to give a sort of recognition to his eldest son. The story of Bhim Singh may again be referred to where Raj Singh, the king, instead of fixing the insignia to the arm of his eldest son Bhim Singh, did give it to his younger son, Joy Singh. We do not know what would have been the effect of this if Bhim Singh had not given up his claim to succession. That this was not always an empty ceremony seems pretty certain from the anxiety shown by the Sardars and Samantas when they heard of this mistake.

Though in Rajpootana primogeniture in legal succession seems always to have been the rule, the principalities were not necessarily impartible in the eye of the ancient Hindus. We have already noticed how ancient kings very often treated their principalities as private properties and divided it among their sons. Mysore may supply an example for such partibility of principality.

We need not stop here to refer to the romantic origin of the Hindu house of Mysore chiefs. Those who feel interested in it would better refer to Wilk's Mysore. Betad Cham Raj was a king of this romantic family and we are told that he partitioned his kingdom among his three sons. Succession of Dud Deo Raj also indicates disregard of the rule of primogeniture; this Dud Deo Raj was not his father's eldest son. Yet in regal succession we find the rule of primogeniture even in this family and this must have been a custom grown subsequently.* In private succession however there was no such privilege reserved for the eldest son.¹

¹ The Revenue system of Northern Circars was that of a village community (see *Fifth Report*),—the village officers being later on hereditary.

At the period preceding the Mahomedan conquest the countries to the north and west of Bengal were divided into different principalities, each under its respective Rajahs. Bengal itself was partly, if not wholly, in the same situation; and these Rajahs were the predecessors of some at least of our Bengal zemindars. The rule of succession in such principalities was that of primogeniture by custom, though never kingdoms were pronounced indivisible by any direct sacred authority.

We have now reached a period in Indian History when we must be prepared to meet with conflicts of law, and the first thing of much importance for us would be to examine how law and justice used to be administered during this period. According to Mahomedan precepts "a Judge must be Moslem, adult, sane, free, male, of irreproachable character; sound of hearing, sight and speech; educated, and enjoying a certain degree of authority in matters of law. Such an authority can be attributed only to one who understands the Koran and the Sonna, and all the texts relating to Jurisprudence."¹ Colonel Galloway in his "Observations on the Law and Constitution of India, etc." informs us that "during the whole period of the Mahomedan History in India, though we have seen that Hindus were employed even at the head of other departments, we have never heard of a Hindu Judge...." If this is so, and if "no Mahomedan Kazi could ever have been found to administer the laws of Manu,"² it becomes an important question how law used to be administered so far as the non-Moslem subjects of those Moslem Emperors were concerned. The principle of personal law does not seem to have met with recognition in the Mahomedan system. "The more

Mahomedan period.

Administration of
law during the period.

¹ Minhaj et Talibin, Bk. 65, Chap. I, Sec. I, p. 500.

See also Sir Abdur Rahim's Muhaimadan Jurisprudence, p. 389. According to the Hanafis a woman may be a qadi.

² Galloway's "Observations, etc., etc....."

tolerant princes may have sanctioned indulgences in cases of private succession, where the interests of the Hindus alone were the subject of discussion, but in *forojudice*, a question of private right, even of inheritance among Hindus, could not have been decided except by the Mahomedan Law, which accordingly provides for such questions, and declares that they are to be determined as between Moslems." ¹ Col. Galloway bases his remarks on a passage in the Futwa-ool-Alamgeree, a celebrated work on the Mahomedan law, compiled in India under the patronage of Aurungzebe expressly for the government of his Indian subjects, which runs as follows: "They² shall take among themselves, by blood and by compact, as Moslems take among themselves, the progeny of a marriage which is legal by their sacred books, though illegal by our law, shall not be debarred from inheriting, but the parties to a marriage, which is illegal by our law, shall not take in virtue of such marriage." ³ Illustrations are added to this rule in the Futwa, and it seems to be clear from them that both the right of inheritance and the extent of shares taken used to be determined by the Mahomedan law.⁴ According to Hedaya⁵ foreigners residing as Moostamins in the Dar-ool-Islam, or any Mussalman country, are presumed from accepting protection to submit themselves to the jurisdiction of the Mahomedan Judge in all matters accruing subsequently to their becoming Moostamins, though not for anything previous thereto.⁶ Futwa-ool-Alamgeree would say that when a Moostamin dies within a Mussalman territory, leaving property in it, and heirs in his own country, the property is reserved for them until they establish their right to it; but a bequest by him in favour of a Mooshi or Zimmee to the full

¹ Galloway.

² Meaning non-Moslem subjects.

³ Futwa-ool-Alamgeree.

⁴ See Baillie's Digest, Vol. I, p. 709.

⁵ Hedaya, Vol. II, p. 193.

⁶ See Baillie's Digest, p. 175.

amount of his estate would be valid, unless his heir had accompanied him on his entrance into the Dar-ool-Islam, when, if the bequests should exceed a third of his property, the excess above the third would require the assent of his heir ; though if his heir had not come originally with him, the bequests would be valid to the full amount of his property.¹ So according to this the privileges of the Mahomedan law would not be extended to a person who was not under the protection of the law at the time when the transaction in relation to which the question arose was completed.

This is with respect to the Moostamins.² With respect to the Zimmies or non-Moslem subjects of a Mussalman power the Futwa-ool-Alamgeriee says : " When disputes arise between them which they are unable to settle among themselves, and are consequently brought for decision before the Muhammadan tribunals, it is necessary that the Judge should have some certain rules for his guidance ; and it is accordingly usual in legal treatises to appropriate one or two chapters or sections under the general heads of law for exhibiting the differences between the law as applicable to Muhammadans and the Zimmies." ³

In the Futwa-ool-Alamgeriee itself we find a separate section for Zimmies in the chapters on dower,⁴ marriage ⁵ and will.⁶ The compilers might have noticed differences in the law in these sections, and it would not be too much to presume that in others they did not find any need for any separate section. It would follow from this that Muhammadan Law was applied in other matters whenever occasion for its application did arise. Even in those chapters where they felt the difference in law the broad principles of Muhammadan Law seems to have been taken

¹ See Baillie's Digest, p. 175.

² The term signifies, non-Muslim aliens.

³ See Baillie's Digest, p. 174.

⁴ See Baillie, Bk. II, Chap. VII, Sec. 15.

⁵ See Baillie, Bk. II, Chap. X.

⁶ See Baillie, Bk. X, Chap. VII.

as the guiding principle.¹ The power of testacy, for example, was accepted as an admitted fact for all Zimmies including the Hindus, though no one would now dispute the proposition that testamentary bequests were not known in the Hindu Law itself.²

If indeed Muhammadan Jurisprudence was so intolerent, it becomes a problem how did Hindu Law survive the Musalman Rule. Col. Galloway observes that in mere civil matters the genuine and bigoted Hindus seldom, if ever, had recourse to foreign tribunal, the decision of their own pundits giving them full satisfaction in such cases.³ Keene says that "purely municipal law might not be very generally appealed to by a population of men provided with arms and habituated to the redress of their own grievances."⁴ I am not in a position to say what amount of truth there is in either of these statements. All that I can say is that in an advanced state of community it is not possible that people would be free to take to self-help or that such a mode of realizing their deserts would satisfy the generality of the population. As to Col. Galloway's observations, we do not know what, if any, was the force behind the opinion of the pundits, and whether in the absence of any such force it is possible that people would generally submit to it specially when the defeated party would be confident of success if he would only think of going to the more authoritative tribunal.

Abdur Rahim dealing with the question of the application of Muhammadan law to non-Muslims generally says: "Ignorance

¹ In Hedaya we have this: "If a Zimmie bequeath more than a third of his estate to a stranger or to an heir, it is not valid, as being contrary to the laws of the Mussalman to which they have agreed to conform with respect to all temporal concerns"—p. 697.

² In Hedaya also there are special sections for Zimmies in the chapters on marriage and will.—(See Hedaya—Grady—pp. 63 and 695.)

³ This would not be impossible when we would remember that during the seven centuries of the Muhammadan rule village communities were in existence throughout Hindustan.

⁴ Keene, History of Hindustan, p. 247.

of a dhimmi or a non-Muslim subject of a Muslim state in matters which do not admit of difference of opinion, such as unity of the Godhead and truth of the mission of the Prophet will not be excused; that is to say, the law will not lend its active support to the doctrines of unbelief touching the essentials of faith. But as to such doctrines of his in which difference of opinion is admissible, the law according to Shafii will recognise their validity so far that it will not offer any active objection to them.”¹ This principle of toleration is, according to him, based upon a precept of the Prophet in which he says “leave alone the non-Muslims and whatever they believe in.” Surely the question of inheritance involves a doctrine in which difference of opinion is admissible, in which there is difference of opinion even among the Muhammadan jurists themselves, and there should not have been any difficulty for a Muhammadan Kadi to recognise Hindu law of inheritance for the Hindus. But it is one thing to say what a Muhammadan Kadi might do, and another what he actually did in matters like this. Sir Abdur Rahim deals with the general principle only and does not say, nor did he undertake to say, how law used to be administered in matters like this. Muhammadan Jurisprudence recognises the force of custom² and it might have been possible for these Kadis to accord recognition to the Hindu law of inheritance as custom prevailing among the Hindus. But a custom which is opposed to a clear text of the Quran or of an authentic tradition would not be respected, and it is quite probable that Hindu law of inheritance would not be acceptable as custom, being opposed to clear Moslem law on the point.

• One interesting question of much practical importance would arise here. We are told that in cases of migration of Hindus from one province to another after the establishment of the two Schools of Hindu Law, the presumption would

Migration and the presumption as to the retention of personal law.

be that the persons migrating would retain their own personal law.

¹ T. L. L., 251.

² See Abdur Rahim, T. L. L., p. 36.

But how would it be possible for them to retain their personal law in matters of inheritance in cases when the migration took place during the Muhammadan rule? Let us take the case of a family migrating from, say, Cawnpore to Bengal during the period of the Moghuls. In cases of disputed inheritance it would either go to the Kadis or to the pundits for a decision, and in either case the decision would be not according to their personal law—because neither of the Judges would recognise that. Even if we assume that the Kadis used to decide such questions with the assistance of the pundits, it would only be reasonable to expect that these pundits will be local ones and as such the very ground for the above presumption will be taken away. The question does not as yet seem to have been approached from this point of view, and it remains to be seen how our judges would solve it whenever it is submitted to them for solution. It is generally believed that during the seven centuries of the Muhammadan rule village communities were in existence. If so, would it be possible for any family of Cawnpore migrating into Bengal to keep itself distinct in matters of personal law from other families of the community?

I have been disproportionately long on this preliminary question and my only excuse is the novelty of the subject. However that be, we may safely assert this much that Muhammadan law did not favour primogeniture, at least in private successions. No doubt we find in it some preference accorded to the males over the females. But it is opposed to the rule of exclusion based purely on the ground of sex or order of birth. Muhammadan law did not favour unification of holdings in any way; partibility and partition are the two things which almost form the policy of the system. It is indeed difficult to say what exact influence this principle of Muhammadan law might have exerted on primogeniture. We have seen that

Muhammadan influence on primogenitary rules.

even prior to the Muhammadan influence the Hindu principle itself was not much in favour of it; and it may be that Muhammadan examples might have

added to the rule of disruption. It must not however be forgotten that though, in theory, under the Muhammadan rule, it was the Muhammadan law which governed, yet the inhabitants were at least allowed to retain their own law and settle their disputes amongst themselves accordingly, if they could do so without resorting to the then courts of law.¹

The history of the law of primogeniture will henceforth be intimately connected with the history of the land system prevailing in the country. Primogeniture in private succession was no longer recognised. In Zemindaries and Principalities, however, where in the very nature of the thing some sort of unification was desirable, the law of single succession would perhaps be the rule. Before proceeding further it becomes necessary therefore to examine the land system prevailing during the period.

The Muhammadan principle of acquisition of property in land does not differ from that of the Hindus. Manu, we have seen, says, **पृथेरपीमां पृथिवीं भार्यां पूर्वविदो विदुः । स्य गुदच्छेस्य केदारमाहुः शास्त्रवतो नृगम् ॥** The exact coincidence of this doctrine with that of the early Muhammadans is worthy of notice. The Muhammadan rule is : "Whosoever cultivates waste lands does thereby acquire the property of them ; a Zimnee becomes proprietor of them in the same manner, as a Musalman."

According to the principles of Muhammadan Jurisprudence "the land of the Sowad is the property (milk) of those who live in it (ahl) ; they have a right to sell it, or to hold it in possession, because the Imam, who has conquered a country by force of arms, may confirm the people in possession of it, and may impose upon it, and upon the heads of the people, a tax or tribute, after which the land remains the property of the people." The land of the Sowad here referred to was Irak, and India was brought under the principles of settlement of the land of the

¹ Baillie, pp. 174.

Sowad of Irak: the people paid the Jizeeat or capitation tax and consented to pay the Khiraj. As has been observed by Col. Galloway, all countries conquered by the Muhammadans were indeed brought under the law laid down by them on the occasion of their first conquest in Irak.¹

If a Moslem army, then, conquered a non-Moslem province or kingdom by force of arms, and the conqueror chose to suffer the inhabitants to remain in it, his duty would be, either himself, or by commissioners to fix the land tax. Those who take land under this settlement becomes proprietors of the soil for ever, and may not be deseized of it, without their consent, so long as they pay the land tax.

According to the great Hunefeeah lawyer, Shumsool Ayamah-oos-Sumkohee, "it is proper that the sovereign appoints an officer for the purpose of collecting the Khurauj from the people in the most equitable manner. He shall collect the Khurauj to the best of his judgment in proportion as the produce is reaped...."² The cultivator is the rubb-ool-arz,—the lord of the soil; and between him and the sovereign no one intervenes who is not a servant of the sovereign; and this servant receives his pay, not out of the produce of the lands over which he is placed, but from the public treasury. Only one collector, Amil, intervenes between the sovereign and the cultivator. Akber appoined a collector over every crore of dams. This officer was called an amilguzzar. "Let the Amilguzzar," we find in Ayeen Akbaree,³ "transact his business with each

¹ Briggs says the same thing: "The land of the Suwaud of Erauk is the property of its inhabitants, they may alienate it by sale and dispose of it as they please; for when the Imaum conquers a country by force of arms, if he permit the inhabitants to remain on it, imposing the *Kurauj* on their lands and the Jizeeat on their heads, the land is the property of the inhabitants and since it is their property, it is lawful for them to sell it or to dispose of it, as they choose" (pp. 109, 110, 112).

² Cited by Col. Galloway

³ Ayeen Akbaree.

husbandman separately, and see that the revenues are demanded and received with affability and complacency." "Let him agree with the husbandman to bring his rents himself *that there may be no plea for employing intermediate mercenaries*. When the husbandman brings his rent, let him have a receipt for it signed by the treasurer. No intermediate mercenaries shall be allowed to come between the sovereign and the cultivator."

It is needless to remind you that these tax collectors, whatever their designations, were mere officers of the Crown without the least pretension of any interest in the soil. Most likely the conquerors found the agency of the officers of Hindu Governments useful in more respects than one; by availing themselves of it, they secured the payment of the tribute in money without materially interfering with the established system of collection or with the vested rights of the proprietors of the soil. Halhed tells us: "it is unlikely that any of the foreigners could have been capable of entering into the minutiae of village details and management; the contracts with the Government for the revenue must necessarily have been made with those natives, who had previously superintended extensive jurisdictions, consisting of ten, twenty, or more parishes, leaving them to make their arrangements with the headmen of single villages, a procedure calculated to meet the wishes of the agriculturists at large. For, with the exception of parishes of large extent, in a high state of cultivation, and thickly populated by people of the same class, firmly bound together by the ties of the blood and common interest, able and willing to resist oppression or open violence, it was certainly more advantageous to proprietors of a single village to place themselves under the protection of a powerful contractor, connected with the ruling power, able and willing to support them and their constituents, by acknowledging him as their overlord, paying through him their quota of taxation, than to enter into engagements direct with Government officers who would have fewer scruples in extracting money from poor persons, ill able to afford the time necessary to seek

justice, than in demanding, or exacting, fees from men whose rank and station in life enabled them to insist upon redress for acts of gross violence and rapacity. These extensive contractors were denominated talookdars or zemindar talookdars, and some of them contracted for the revenue of tracts of country comprising two or three hundred villages, or of whole provinces.”¹

Whatever might have been their position at the inception it seems clear however that even before the Mahomedan rule, these ‘tax-collectors’ or ‘extensive contractors’ succeeded in making their offices hereditary. Colonel Briggs says, “each Hindu village had its distinct municipality and over a certain number of villages or districts was an *hereditary* Chief and accountant both possessing great influence and authority, and certain territorial domains, or estates.”² The Mahomedan rulers adopted the machinery for collecting the revenue already prevailing in the country.³ “The Mahomedans early saw the policy of not disturbing an institution so complete, and they availed themselves of the local influence of these officers to reconcile their subjects to their rule.”⁴ The Des Adhikars of the Hindu Kings became the Zemindars of the Mahomedan rulers, and these local Hindu Chiefs were cherished and maintained with great attention by the Mahomedan rulers as the keystone of their civil government.⁵

¹ Halhed, p. 39.

² Briggs, p. 118.

³ Phillips, T.L.L., pp. 57-61.

⁴ Briggs, p. 118.

⁵ See Mirza Mohsen as quoted by Rouse, pp. 46-48 :

“In times prior to the irruptions of the Mahomedans, the Rajahs who held their residence at Delhi, and possessed the sovereignty of Hindustan, deputed officers to collect their revenues (kheraj) who were called in Indian language Chowdheries. The word Zemindar is Persian.”

“On the Mahomedan conquest, the lands in Hindustan were allotted to Omrah Jaghirdars for the maintenance of the troops distributed

Though hereditary, it was still an office and nothing more. It fell within the duty of the Zemindar "to superintend that portion of the country committed to his charge, to do justice to the ryots or peasants, to furnish them with the necessary advances for cultivation, and to collect the rent of Government; and, as a compensation for the discharge of this duty, he enjoyed, certain allotments of land rent-free, termed Saveram, which were conveniently dispersed through the district, so as to make his presence necessary everywhere in order to give the greater effect to his superintendence."¹ "He was entitled to receive certain russoons or fees on the crops and other perquisites drawn from the sayer or customs, and from the quit-rents of houses. These personal or rather official land and perquisites, amounted altogether to about ten per cent. on the collections he made in his zemindary."² "The office itself was to be traced as far back as the time of the Hindu Rajahs. It originally went by the name of Chowdrie, which was changed by the Mahomedans for that of Crorie, in consequence of an arrangement by which the land was so divided among the collectors that each had the

throughout the country. Several of these Omrahs having rebelled, the emperors thought it would be more politic to commit the management of the country to the native Hindus, who had most distinguished themselves by the readiness and constancy of their obedience to the Sovereign power. In pursuance of this plan, districts were allotted to members of them under a reasonable revenue (jummah monasib) which they were required to pay in money to the governors of the provinces, deputed from the Emperor."

The Chowdhury, under the sovereignty of the Rajahs, had no concern in the administration of the country.

As to the difference between a Zemindar and a Chowdhury see also Appendix to the Minute of Sir John Shore—Harrington's Analysis of Regulations, p. 113.

¹ Fifth Report, pp. 80-81.

² *Ibid.*

charge of a portion of country yielding about a crore of dams, or two and a half lakhs of rupees."¹

That the zemindar's was an office only and nothing more gets the amplest confirmation in the fact of the removal of the whole of the zemindars in Bengal from their offices, by Jazzir Khan, the Subadar under the Government of Aurungzebe, when all the power of the Empire were in their vigour, and when, of course, the sanction of Government attended the measure.² Patton shows that this was not an extraordinary and high-handed measure taken by that powerful monarch but was one conformable to the rules; and, in support, quotes from Remayat Alamgeri in which firmans are preserved that would go to show that these zemindars were always removable for misconduct. The Emperor in a Firman preserved in the Remayat Alamgeri says that "if an aumeen, aumil, chowdry, or canoongoe be guilty of exactions and should not be restrained by punishment and coercive measures, write an account thereof to our presence, that he may be dismissed from his office and another appointed in his room."³

It will not be out of place to notice here certain facts which would go to show that at a comparatively late period in the history of Mahomedan rule in this country there was no such thing as a great zemindar either in Bengal or Behar. We find in the Ayeen Akbaree that "it is not customary in the soobah of Bengal, for the husbandman and Government to divide the crop. The produce of the land is determined by nussuk; that is by estimate of the crop. The ryots in the Soobah of Bengal are very obedient to Government, and pay their annual rents in eight months, by instalments, *themselves bringing mohurs and*

¹ *Ibid.*

² Patton's Asiatic Monarchies, pp. 54 and 167.

³ Patton's Asiatic Monarchies, p. 54.

See also Select Committee, 1810, Appendix No. 12.

rupees to the places appointed for the receipt of the revenue." Of Behar the author of the *Ayeen Akbaree* says the same.¹ So at the date of the *Ayeen Akbaree*, in Bengal and Behar, it would not be probable that great zemindars would be in existence, and Sir John Shore pointed out in 1788 that "most of the considerable Zemindars in Bengal may be traced to an origin within the last century and a half. The extent of their jurisdiction has been considerably augmented since the time of Jafur Khan (1) by purchase from the original proprietors, (2) by acquisition in default of legal heirs, or (3) in consequence of the confiscation of the lands of other zemindaries; (4) instances are even related in which zemindaries have been forced upon the incumbents."²

Before proceeding further I feel tempted to give here an account of what Mirza Mohsen is said to have stated in answer to queries by Rouse regarding the Zemindars in Bengal. The question that was put to him was the following: "In the dewany sunnuda a zemindary is styled an office-khidamat, and an office is dependent upon the pleasure of the employer. But at present the children of the Zemindar take possession of the land enjoyed by their father and grandfather, as an inheritance. How long has this rule of inheritance in zemindaries prevailed? and by what means has it been established?" Mirza Mohsen, whom Rouse describes as 'a man of small but independent fortune, possessed of extensive learning and a magistrate of unimpeachable integrity, says in his answer, which was the result of his reading and enquiry: "The reason for calling the zemindary an office in the dewany sunnud, is this. The Zemindars are commissioned on the part of the sovereign for three duties:—First, the preservation and defence of their respective boundaries from traitors and insurgents. Secondly,

¹ *Ayeen Akbaree*.

² *Ibid.*

³ Harrington's *Analysis*, pp. 23-24.

the tranquillity of the subjects, the abundance of cultivators, and increase of his revenue. Thirdly, the punishment of thieves and robbers, the prevention of crimes, and the destruction of highwaymen. The accomplishment of these objects is considered, in the royal grant, as the discharge of office to the sovereign, and on that account the word Khidmat (office) is employed in the Dewany Sunnud for a Zemindary." He proceeds to classify the Zemindaries of the present period and says they are of three sorts: (1) Jungul-boory, (2) Intekaly, and (3) Ahekamy. Jungul-boory (clearing of waste) is a tract of land which having gone to decay, and become incapable of producing the amount of the royal revenue (jumma pudshahy) has been restored to prosperity by the diligence and industry of another person, who has thereby re-established the revenue of the Crown (Kheraji). Intekaly (Transfer) is laid in a good state of cultivation and productive to the amount of the revenue, yet on account of the neglect of the incumbent, or for want of heirs to the land, another person has, with the permission of the Emperor, or of the Government delegated by him, obtained a Sunnud for the office in his own name. And Ahekamy (By Order or Authority) is, when, notwithstanding the diligence of the Zemindar in the duties of his station, the officers about the person of the prince, who are employed in the affairs of the Zemindars, have, upon interested motives, obtained orders for Zemindaries to be granted to them in their own names."¹ As to the rule of inheritance in Zemindaries Mohsen said: "It was a rule in the time of the ancient emperors, that when any of the Zemindars died, their effects and property were sequestered by the Government. After which, in consideration of the rights of long service, which is incumbent on sovereigns, and elevates the dignity of the employers, Sunnuds for the office of Zemindary were granted

¹ Rouse's Dissertation concerning Landed Property in Bengal, 1791, pp. 51-54.

to the children of the deceased Zemindar, and no other person was accepted because the inhabitants could never feel for any stranger the attachment and affection which they naturally entertain for the family of the Zemindar, and would have been afflicted if any other had been put over them." "At present, the children of a Zemindar take to the land possessed by their fathers and grandfathers as an inheritance; it is done upon the strength of the ancient customs and institutions, according to which the Zemindary of the father was transferred by Sunnud to the son." It was indeed the policy of the Emperors to continue the office of Zemindary to the children of any deceased Zemindar so that the Zemindars might have some impetus for employing their strenuous endeavours to promote the prosperity of their districts. "With regard to one species, indeed, the jungul-boory, it is conformable to the holy law, and to common practice, that persons should gain an hereditary Zemindary in land which they have cleared from waste, under the encouragement of the prince, and brought into a state of cultivation, so as to produce the full revenue of Government, and the children of such persons have a decided right to hereditary possession which both ancient and modern sovereigns have recognised."

If Zemindary was an office and nothing more,¹ it is indeed natural to expect that it would initially be non-hereditary. Yet, in ancient India, there always has been a tendency to make things hereditary, and Phillips was not wrong in characterising

Patton in his 'Asiatic Monarchies' says, "There can be no question that the appointment of a Zemindar is an office. To deny this appears to me like denying that a man has a nose upon his face. The refutation is effected in the same manner; we point to the nose; we point to the zemindary Sunnud. Of the two the evidence in the last case seems to be the strongest: for, upon the feature in question the word *nose* is not written; but in the Sunnud, the word *office* is expressly written, and the appointment declared to be an office." P. 83.

See also Campbell's "Able Paper," 1832.

the Hindu system as essentially hereditary. Hindu officers succeeded to their offices simply by descent or by the mixture of descent and election.¹ The Mahomedan system of government however was throughout a non-hereditary system, and during Mahomedan rule even the established hereditary rights under the Hindu Kings were not sufficient for succession to offices without some recognition by the State.² "The Zemindars succeeded to their zemindaries by right of inheritance ; but until they consented to the payment of peshkash, or fine of investiture, to the emperor, and a proportional nuzzeranah, or present to the Nazir (Provincial Governor), neither the imperial firman of confirmation was granted them nor were they permitted to substitute their own signature to the public accounts in lieu of their predecessor's."³

Whatever that be, a zemindar as such possessed a valuable and often hereditary contract interest in the land revenue of the state, the collection of which was transferred to him. But as zemindar he had no right whatever in the soil itself, which, subject to the payment of the revenue belonged to the cultivators on the various tenures.

If zemindary was an office and if gradually by custom it became hereditary one would expect that the rules of succession would bear the stamp of this official nature of the zemindary. Even though allowed to descend to the heirs of the deceased zemindar, it is not probable that any Government would allow division of the office, and in a zemindary single succession

¹ Phillips, T.L.L., p. 42.

²A system of Government which was opposed to hereditary offices, would naturally tend to become, if it was not originally a highly centralised Government.....See Phillips, T.L.L., p. 42. Phillips ascribes to this the decay into which the village system fell during the Mahomedan rule, the Zemindars rising in power and displacing to a great extent the village headman.

³ ...Patton, pp. 177-78.

would be what we should expect to find. In fact Patton bases his argument against the zemindar's claim to the soil on this, and says that the very fact that in zemindary only one son succeeds goes to show that it was anything but landed estate.¹ We need not stop here to examine the proposition enunciated by Patton as to the inferences to be drawn from single succession rules. Nor is it necessary for us here to see whether or not there is anything in Hindu Law supporting single succession in landed property. All that we need notice here is the fact that in most of the zemindaries the rule of single succession prevailed and in most cases it was the eldest son who succeeded. The then Government perforce applied the official rule to zemindaries which had been officially created, such as the numerous creations of Jafar Khan. The minor zemindars, who were proprietors of the whole estates for which they paid revenue direct to the treasury, would be exempt from official rule.

It has already been noticed that some of the zemindars could acquire real property in the soil. Indeed Zemindar's private property. the circumstances under which they acquired property in the soil in those cases are those contemplated both in the Hindu and Muhammadan Jurisprudence

¹ Patton's Asiatic Monarchy, p. 170.

See also Revenue Letter from Bengal, 6th March, 1793, para. 8. The same principles which induced us to resolve upon the separation of the taluks, prompted us to recommend to you, on the 30th of March, 1792, the abolition of *a custom introduced under the Native Governments by which most of the principal zemindaries in the country are made to descend entire to the eldest son, or next heir of the last incumbent, in opposition both to the Hindu and Mahomedan Law, which admit of no exclusive right of inheritance in favour of Primogeniture, but require that the property of a deceased person shall be divided amongst his sons or heirs, in certain specified proportions...* As quoted in Zemindary Settlement in Bengal, App. VI, p. 110.

See also Harrington's Analysis, p. 113, and appendix to Minute of Sir John Shore, 2nd April, 1788.

as the best of the modes of acquisition of property. It must not also be ignored that the view that zemindary is an office is by no means opposed to the fact that the zemindars might also have property in the soil. Nearly all the zemindars, from the highest to the lowest, were also themselves cultivators to a greater or less extent. "The petty head of the village, besides being a zemindar, was also, perhaps, the greatest cultivator in his own neighbourhood." Besides it was never forbidden for a zemindar to purchase property like other individuals. Whatever property the zemindar might have, should descend to his heirs by the ordinary rule of descent, and this rule would of course be very different from those governing succession in the zemindary itself.

Here the views of Holt Mackenzie regarding rule of succession in zemindaries may be noticed. According to him "there was no such system of regular separation previously to the permanent settlement. In some cases a zemindary seems to have been regarded as an office generally of little value. In others there appears to have prevailed a special custom of primogeniture ; and although the general system was to recognize the property as hereditary and divisible, yet under short leases divisions could scarcely be made pending a settlement." As to the prevalence of the primogenitary rule of descent in zemindaries, Holt Mackenzie says, "it prevailed in regard to some estates in all the provinces but is now confined to certain extensive zemindaries on the western frontier of Bengal and Behar, where the zemindars are the descendants of old rajahs, who were never wholly subdued by the governments that preceded us."

It has been said that though a mere office, the zemindaries early became hereditary and in them the rule of succession was usually primogenitary. No doubt during the Mahomedan rule no rule of succession would hold good unless and until recognition is secured from the Emperor. Yet in most cases such recognition was given only on payment of money. In India

indeed there always has been a tendency to turn offices hereditary,¹ and one should not be surprised at this. The soil where caste system did develop would surely contain strong germs of hereditariness. Almost all the village offices also grew hereditary. The mokudums were thus executing their offices of Purdhan or mokudum under an original hereditary right, and instances of the office being sold by the incumbent are also on record. On the office falling vacant, the eldest son of the late incumbent generally succeeded. Yet this mokudum was only the village headman of the Hindu system who was a public officer having to arrange all the revenue details of his village.²

Had these two classes of properties been kept separate there perhaps would not have been any complexities regarding the Law of Primogeniture. But the distinction was either unknown or soon forgotten. The right of the zemindar to the receipt of the land revenue from the cultivator subject to his own payment to Government of a separate, lower, or reduced composition in lieu of it,³ and his right to the soil itself which he owned like all other private individuals are indeed two very distinct rights.⁴ As Zemindar he could not have any claim to the land of the

¹ See Cobden Club Essay, System of Land Tenure in various Countries—India—Campbell, p. 164—"The tendency of everything Hindu is to become hereditary."

² Halhed's Memoir on the Land Tenure and Principles of Taxation in the Bengal Presidency.

³ Perhaps periodically adjusted between the zemindar and the State. (See Campbell's 'Able Paper'.)

⁴ See Galloway's "Observations, etc." where he quotes from what the son of the former Nazim of Behar said in reply to questions put to him by Sir John Shore (afterwards Lord Teignmouth). The quotation runs as follows: "According to the strict right no person can become the proprietor of land, but by one of the three above-named modes, *viz.*, by purchase, by gift from the proprietor, or by inheritance; though by usage

zemindary: there is no proof of the existence of such right discernible in his relative situation under the Mogul Government in its best form : he had undeniably property in the land revenue of his entire zemindary at least when the right to collect revenue became hereditary. This property right somehow got confounded with the separate property in the land itself, which, as a cultivator, he possessed in some of the fields of his zemindary. One result of such confusion had been to apply the same rule of succession in both cases. To land, of which the proprietary right was not official, including the reclaimed waste, the inheritance need not have been subject to any rule of unity of succession, and indeed originally these must have been descendable to all the heirs equally. Though divisible, these were however scarcely divided by the people amongst whom jointness was the rule. This must have given rise to impartible estates, originally partly indivisible being no property in the land, and partly divisible but never divided. Later on the English among whom the Law of Primogeniture and hereditary succession applies peculiarly to landed property, might have helped the confusion making the whole the landed property of the zemindar.¹

Phillips traces the zemindars and talookdars to the ancient rajahs and revenue collectors, and says how these zemindars and talookdars generally contrived to absorb the functions, or at least the chief emoluments, of the headman of the village system and to displace him to a great extent. According to

the Emperor or his representative may displace him (Zemindar) for contumacy and refractory behaviour and appoint another by Sunnud in his room. Whatever land a zemindar may have become the proprietor of by any one of the three above-mentioned modes (*viz.*, purchase, gift, inheritance) descends in the line of inheritance; but whatever is not actual property, is consequently not of an hereditary nature—if a zemindary be the actual property of any person, his heir has an undoubted right to succeed without the sanction of the ruler.

See Zemindary Settlement in Bengal, Chap. IV, p. 131.

¹ See Patton's Asiatic Monarchies, pp. 195-96.

him the descent by Primogeniture points to the zemindaries having been derived from the ancient rajahs.¹ No doubt a raj might descend mainly in this mode. But as we have noticed elsewhere even here the Hindu system did not always favour single succession, and we have heard of division of principalities amongst the heirs of ancient rajahs. As soon as the raj becomes the property of the rajah it becomes heritable by all the heirs equally: and if we really do not find frequent actual divisions the Hindu mentality that was responsible for the jointness of family was perhaps to account for this phenomenon.

From what has been said already one would be in a position to see how far Grant was correct in saying that "no one tribe of Hindu land-holders, excepting the ancient rajahs of the country which have been particularised as descendants of the royal family of Orissa or Gajaputty, have in right, form or fact, the smallest pretension to any territorial property beyond the extent of their specified official domains." Surely nothing could prevent a zemindar from acquiring such property, and we have said enough to show that they did actually acquire properties which should have been descendable to their heirs by the ordinary law of descent.

Before closing this chapter we must notice the Law prevailing in the different schools of Hindu Law that originated during this period. There has indeed been a great deal of controversy over the question whether or not there are really different schools of Hindu law. According to Mayne, there are only two such schools in any real sense, and these are the *Dāyabhāga* and the *Mitāksharā* schools. The various subdivisions of the *Mitāksharā* school however differ materially on important points as between themselves, and if these differences count for anything it is hard to deny the name 'school' to these subdivisions. As to the growth of these different schools the judicial committee seems rightly to have observed that "works universally or very

¹ Phillips, T.L.L., pp. 63-64.

generally received became the subject of subsequent commentaries. The commentator puts his own gloss on the ancient texts, and his authority having been accepted in one and rejected in another part of India, schools with conflicting doctrines arose."¹ Mr. Setlur has pointed out the reason why this divergence arose. "It would be unreasonable," Setlur points out, "to suppose that any theoretical treatise would, as such be accepted in a particular province and give rise to a new school. For, in such an eminently practical department as law, which affects the every-day life of man at every step, it is impossible that a community proverbially tenacious of its customs as the Indian, would accept the theoretical deductions of any writer, however able or clever. On the other hand, it is more in consonance with reason to suppose that the success or failure of a given treatise, commentary or digest, would entirely depend on the success achieved by the author in bringing his theoretical conclusions into harmony with customary law."

Setlur may be correct in his account of the origin of schools; yet it cannot be denied that jurists always exert a great influence in the development of law. Great social forces spread themselves like a fluid throughout universal mentality. They are scattered sparsely amidst the human agglomeration. In the several channels of language, religion, law and the like, they show themselves by a fluctuating distribution of a certain total of beliefs, needs and desires. But this diffusion and reception do not exhibit in all the same force or intensity. At intervals there is an accumulation and an incarnation in marked individualities—great artists, great prophets, great despots and great jurists. These are supermen. Sometimes this accumulation of force rises to the degree of genius. The great jurists may either be precursors, prophesying the future; or analysts, penetrating into life; or generalizers, overcoming

¹ Collector of Madura *vs.* Muthuramlinga, 12 M. I. A. 435.

resistance. Some make ready the path ; some increase force or light.¹

Whatever that be, the leading commentaries of these different schools all originated during the Mahomedan rule,² and we are told that it may be safely concluded "that the schools originated in different authors of commentaries and digests putting glosses on the ancient texts, in order to squeeze out from them rules and principles supporting the new customs prevailing in the provinces governed by them at the time of their composition." An examination of the commentaries therefore would at least indicate how far primogenitary rules prevailed as part of the customs and usages of the Hindus during this period.

We shall start with Mitāksharā. Vijñāneswara while commenting on the following text of Yājñavalkya :

“विभागश्चेत् पिता कुर्व्यात् स्वेच्छया विभजेत् सुतान् । ज्येष्ठं वा श्रेष्ठभागेन सर्वे वा स्युः समांशिनः ॥” says, इच्छाया निरङ्कुशत्वादनियमप्राप्तौ नियमार्थमाह ज्येष्ठं वा श्रेष्ठभागेन इति । ज्येष्ठं श्रेष्ठभागेन मध्यमं मध्यमभागेन कनिष्ठं कनिष्ठभागेन—विभजेदित्यनुवर्तते । श्रेष्ठादिविभागश्च मनुनोक्तः—ज्येष्ठस्य विंश उद्धारः सर्वद्रव्याश्च यद्दरम् । ततोऽर्धं मध्यमस्य स्यात् तुरीयंतु यवीयसः ॥ इति । वाशब्दो वक्ष्यमाणपक्षोपेक्षः ‘सर्वे वा स्युः समांशिनः’ । सर्वे वा ज्येष्ठादयः समांशभाजः कर्तव्याः । अयं च विषमो विभागः स्वार्जितद्रव्य-विषयः । पित्रक्रमायाते तु समस्त्रायस्य वक्ष्यमाणत्वाच्चेच्छया विषमो विभागो युक्तः ।

“No rule being suggested (for the will is unrestrained) the author adds, by way of restriction, “he may separate (for this term is again understood) the eldest with the best share,” the middlemost with a middle share, and the youngest with the worst share. This distribution of the best and other portions

1 See Roscoe Pound, Interpretation of Legal History.

2 See Setlur, Hindu Law, pp. xi & xii.

Sarkar, Law of Adoption, *Lect. iii.*

is propounded by Manu : 'The portion deducted for the eldest is the twentieth part of the heritage, with the best of all the chattels; for the middlemost, half of that, for the youngest, a quarter of it.' The term 'either' is relative to the subsequent alternative 'or all may be equal sharers.' All, *i.e.*, the eldest and the rest, should be made partakers of equal portions. *This unequal distribution is allowed in respect of his self-acquired property. But, if the wealth descended to him from his father, an unequal partition at his pleasure is not proper: for equal ownership will be declared.*"

Later on we are told, नूनाधिकविभागेन पुत्राणामसौ नूनाधिक विभागो यदि धर्म्यः शास्त्रोक्तो भवति तदाऽसौ पित्रक्तः कृत एव न निवर्तते इति मन्वादिभिः स्मृतः । अन्यथा तु पित्रक्तोऽपि निवर्तते इत्यभिप्रायः । यथाह नारदः 'व्याधितः कुपितश्चैव विषयासक्तमानसः । अन्यथाशास्त्रकारी च न विभागे पिता प्रभुः ।' इति ।

"A legal distribution, made by the father among sons separated with greater or less share, is pronounced valid."

"When the distribution of more or less among sons separated by an unequal partition is legal, or such as is ordained by the law, then that division, made by the father, is irrevocably made and cannot be afterwards set aside: so it is declared by Manu and the rest. Else it fails, though made by the father. Such is the meaning; and in like manner, Nārada declares "A father, who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by wordly pleasures, or who acts otherwise than as the sacred law permits, has no power in the distribution of the estate."

After thus giving the rule of division by father, Vijnānēswara proceeds to explain the text of Yājñavalkya which says,

विभजेरन् सुताः पित्रोर्द्वि रिक्त्यर्थं समम् and makes the following comment :

सममेवेति रिक्त्यर्थं च विभजेरन् । ननु ऊर्ध्वं पितुश्च मातुश्च इत्युपक्रम्य "ज्येष्ठ एव तु गृह्णीयात् पित्रा" धनमशेषतः । शेषास्तमुपजीवियुर्यथैव पितरं

तथा" इतुग्नोक्तम्—“ज्येष्ठस्य विंश उद्धारः सर्वद्रव्याश्च यद्दरम् । ततोऽर्धं मध्यमस्य स्यात् तुरीयं तु यवौयसः” इति । सर्वस्वाचनसमदायाद्विंशतितमोभागः सर्वद्रव्येभ्यश्च यज्ज्येष्ठं तज्ज्येष्ठाय दातव्यम् । तदर्धं चत्वारिंशत्तमो भागो मध्यमं च द्वयं मध्यमाय दातव्यम् । तुरीयमशीतितमो भागो जौनं च कनिष्ठाय दातव्यमिति मातापित्रोरुर्ध्वं विभजतामुद्धारविभागो दर्शितः । तथा उद्धारोऽनुवृत्ते त्वेषामियं स्यादंशकल्पना । एकाधिकं हरेज्येष्ठः पुत्रोऽर्धं ततोऽनुजः । अंशमंशं यवौयांस इति धर्मो व्यवस्थितः ॥ इति ।

“In equal shares only should they divide the effects and debts. But Manu, having premised ‘partition after the death of the father and the mother’ and having declared, ‘the eldest brother may take the patrimony entire, and the rest may live under him as under their father;’ has exhibited a distribution with deductions, among brothers separating after the death of their father and mother: ‘The portion deducted for the eldest is the twentieth part of the heritage with the best of all the chattels; for the middlemost, half of that; for the youngest, a quarter of it.’ The twentieth part of the whole amount of the property (to be divided), and the best of all the chattels, must be given (by way of deduction) to the eldest; half of that, or a fortieth part, and a middling chattel, should be allotted to the middlemost; and a quarter of it, or the eightieth part, with the worst chattel, to the youngest. He has also directed an unequal partition, but without deductions, among brothers separating after their parents’ decease; allotting two shares to the eldest, one and a half to the next born, and one apiece to the younger brothers.”

He then notices several other texts indicating unequal division and says, उद्धार व्यतिरेकेणापि विषमो विभागो दर्शितः, पित्रोरुर्ध्वं विभजतां जौवहिभागे च स्वयमेव विषमो विभागो दर्शितः अतः सर्व-
स्वापिकाले विषमो विभागोऽस्तीति कथं सममेव विभजेरिति नियम्यते ।

“The author himself has sanctioned an unequal distribution when a division is made during the father’s life-time ‘Let him either dismiss the eldest with the best share, &c.’ Hence

an unequal partition is admissible in every period. How then is a restriction introduced, requiring that sons should divide only equal share? This is only a probable contention of the opponent, and Vijñāneswara refutes this by saying : सत्त्वम् अयं विषमोविभागः शास्त्रदृष्टः, तथापि लोकविद्विष्टत्वानुष्ठेयः “असत्त्वम् लोकविद्विष्टं धर्म्यमप्याचरेत्तु” इति निषेधात् ।

“True, this unequal partition is allowed by the sacred ordinances ; but it must not be practised, because it is abhorred by the world ; for that is forbidden by the maxim ‘Practise not that which is legal, but is abhorred by the world.’”

In support of his argument he cites several instances¹ where Shastric Vidhānas are not followed because they are लोकविद्विष्ट and quotes “यथा नियोगधर्मीनो नानुवन्ध्यावधोऽपि वा । तथोद्धारविभागोऽपि नैवं संप्रति वर्तते,” इति । Further he cites Āpastamba and says आपस्तम्बोऽपि “जोवन् पुत्रेभ्यो दायं विभजेत् समम्” इति समतामुक्त्वा जेष्ठादायाद इत्येके” इति कृतस्त्रधनग्रहणं ज्येष्ठस्यैकोयमतेनोपन्यस्य “देशविशेषे सुवर्णं कृष्णागावः कृष्णं भौमं ज्येष्ठस्य” इत्येके इत्येकोयमते नैवम् उद्धारविभागं दर्शयित्वा “तच्छ्राप्तेर्विप्रतिषिद्धम् इति निराकृतवान् । तं च शास्त्रप्रतिषेधं स्वयमेव दर्शयित्वा “मनुः पुत्रेभ्यो दायं व्यभजेत् इत्यविशेषेण श्रूयते” इति ।

“Āpastamba also, having delivered his own opinion, ‘A father, making a partition in his life-time, should distribute the heritage equally among his sons ;’ and having propounded, as the doctrine of some, the eldest son's succession to the whole estate (‘Some hold, that the eldest is heir’) and having exhibited, as the notion of others, a distribution with deductions, (‘In some countries, the gold, the black kine, and the black produce of the earth, belong to the eldest son ; the car appertains to the father ; and the furniture in the house and her ornaments are the wife's ; as also the property (received by her) from kinsmen. So some maintain ;’) has

¹ ‘महीचं वा महीजं वा श्रीविद्यायोपकल्पयेत्’ इति विधानोऽपि लोकविद्विष्टत्वादननुष्ठानम् । यथा वा जैनाश्चर्चो वा यशस्ववन्ध्यामात्रमेत इति गवाक्षधनं विधानोऽपि लोकविद्विष्टत्वादननुष्ठानम् । etc., etc. .

expressly forbidden it as contrary to the law ; and has himself rejected it as opposed to the sacred code : 'It is recorded in scripture, without distinction, that Manu distributed his heritage among his sons.' "

From all these Vijñāneswara concludes : तस्माद्विषमोविभागः शास्त्रदृष्टोऽपि लोकविरोधात् श्रुतिविरोधाच्चानुष्ठेय इति सममेव विभजेरन्निति नियम्यते ।

" Therefore unequal partition, though spoken of in codes of law, should not be practised, since it is disapproved by the world and is contrary to scripture. For these reasons, a restriction is ordained, that brothers should divide only in equal shares."

The author of the Smritichandrikā dismisses the subject by remarking that unequal partition does not prevail in the Kali age. After stating the various rules of unequal division to be found in the various Shastras, Devanda Bhatta says, अयं च विषमविभागप्रकारः कलियुगे तु न वर्तते इत्याह संग्रहकारः—“यथा नियोगधर्मोऽद्यमानवन्व्यावधोपिवा, तथोच्चारविभागोपि नैव संप्रति वर्तते”॥ अथ संप्रतीत्येती शब्दौ कलियुगमभिसम्वायोक्तौ । This unequal partition does not, however, prevail in the Kali age. Saṅgrahakāra says :—“As the duty of an appointment to raise up seed to another and as the slaying of a cow for a victim are not in vogue at the present day, so is 'now' partition with deductions. The words 'at the present day' and 'now' are both used in the above text to denote the present Kali age."

Later on he refutes Vijñāneswara's reasons against unequal division and says, यत् पुनर्विज्ञानेश्वरेणोक्तं—‘सत्यमयं विषमोविभाग शास्त्र दृष्टः, तथाऽपि लोकविद्वेषोऽस्ति, प्रलुप्तविद्यागुणपुण्यकर्मसम्पन्न ज्येष्ठादौ भागाधिक्ये लोकानुरागे दृश्यत इति यत्किञ्चिदेतत् । “What Vijñāneswara says : ‘True, this unequal partition is found in the sacred ordinances, but it must not be practised because it is abhorred by the world’ is not ‘proper, for this too is not founded in truth. The people do not in reality abhor partitions with deductions or unequal distributions. On the contrary,

they seem to be anxious to allow a greater portion to the eldest and other brothers if endowed with learning, good qualities and virtuous act.' "

He then proceeds : ये पुनः स्मृति समुच्चयकाराः शम्भु ओकर देवस्वाम्यादयः उद्धारविषमविभागयो शिष्टाचारं क्वापि मन्यमाना उद्धारदिविषयाणि बहूनि स्मृतिवाक्यानि विचारयितुं ग्रन्थविस्तरं चक्रिरे तेषां धर्मश्च समयपुराणवचनाभ्यां कलौ सर्वत्र शिष्टाचाराभावस्य निश्चितत्वाद्दृष्टेव प्रयासो ग्रन्थविस्तरश्च जात इत्यस्माभिरुद्धारदिविषये दिक्षाचमेव प्रदर्शितम् ॥ "The compilers of laws, Samboo, Srikara, Devasvami, and the like, have published volumes even in the present age on the subject of deductions, under the impression that they are, in some instances, allowed by the usage of the virtuous. The learned have, however, decided, with reference to religious books, purāṇas, that no such usage of the virtuous exists in the Kali age. We therefore thought that to treat the subject in detail would only swell the work uselessly, and accordingly gave but a hint of the matter."

According to Devanda Bhatta ज्येष्ठ in the texts means one who is both senior in birth and superior to all in learning and the like. "ज्येष्ठस्य अग्रजस्य विद्यादिवशादुत्तमस्य." He cites Vrihaspati as his authority for this meaning who says, "जन्मविद्यागुण ज्येष्ठो ह्यंशं दायमवाप्नुयात्."

From this text Devanda Bhatta concludes एवञ्च न जन्मतः प्राथम्यादिमात्रमुद्धारि विषमविभागे वा कारणं, किन्तु विद्यादिनिबन्धन श्रेष्ठत्वाद्युपेतं प्राथम्यादिकमिति मन्तव्यम्. "It should thus be understood that it is not the seniority of birth alone that entitles one to a greater share by way of deduction or unequal distribution, but also superiority in point of learning and the like."

It will be interesting to notice here how this author attempted to explain the various texts indicating the prevalence of primogeniture in the Hindu system in an earlier age. His view is summarised in the saying "एवं विभागानधिकारि सर्वनसाहित्यादनेकावैऽपि एक एव गृह्णीयात्," "likewise, even where there are several brothers of the same class, one alone will take the whole estate where the others are under disabilities to

participate in the same." He then cites as an authority for this proposition :

सर्वमेव हरेज्ज्येष्ठोऽनुजेष्वनधिकारिषु ।

मध्यमो वा कनिष्ठो वा ज्येष्ठस्यनधिकारिणि ॥

"The whole estate will be taken by the eldest where the younger brothers are disqualified, and by the middlemost or the youngest, where the eldest is disqualified."

As for the text of Manu :

ज्येष्ठ एव तु गृह्णीयात् पितरं धनमशेषतः ।

शेषास्तनुपजीवियुः यद्यैव पितरं तथा ॥

he says, अग्रगल्भ भ्रातृषु तु तत्प्रागलभ्य पर्यन्तं सहवास एव कार्योऽनेन प्रकारेणेति दर्शयितुं ज्येष्ठ एव तु गृह्णीयात् इत्युपदेश इति नानेन वचनेन वचोभङ्गा सवर्णनिक भ्रातृषु दायविभागः प्रतिषिध्यत इति । "The text, the eldest brother alone shall take the patrimony entire and so forth is intended to show that where younger brothers have not attained majority ; common abode in the manner therein indicated is imperative until they attain their full age. This text therefore does not altogether negative partition of heritage among brothers of the same class.

The text of Narada :

विभ्रयाहेच्छत सर्वान् ज्येष्ठोभ्राता यथा पिता ।

भ्राताशक्तः कनिष्ठो वा शक्त्यपेक्षाकुलेस्थितिः ॥

"Let the eldest brother, of his free will, support the rest like a father or let a younger brother, who is capable, do so. The continuance of the family depends on ability," is also dismissed by saying तदशक्ताखिलानुजविषयम् । "This is applicable to a case where all the other brothers are under disability."

The text of Gautama "सर्वं वा पूर्वजस्य इतरान् विभ्रयात्" seems to give him the greatest trouble and he dismisses it by saying

“प्रत्यक्षश्रुतिविरुद्धत्वादानादर्थव्यम्।” being directly opposed to Sruti, should not be accepted.

As his final authority on the point he refers to Āpastamba who says, “जेष्ठोदायाद इत्येके तच्छास्त्रैर्दिप्रतिषिद्धं मनुः पुत्रेभ्यो दायं व्यभजदित्यविशेषेण श्रूयते इति।” “Some hold that the eldest is heir, but this is contrary to law; it being recorded in Sruti that Manu distributed the heritage among his sons without distinction.”

Devanda Bhatta then proceeds : जेष्ठ एव भ्रातॄणां मध्ये पैतृकधन-भागित्येके पुनराचार्या मन्यन्ते तन्मतं प्रत्यक्षश्रुतिविरुद्धं, यत्सैत्तिरीयक ब्राह्मणे —मनुः पुत्रेभ्योदायं व्यभजत् इत्यविशेषेण श्रूयते इत्यर्थः। स्वमतं चानन्तरं तेनैवोक्तं सर्वे हि धर्मश्रुक्ताभागिनः इति। “The meaning of the above is that some Āchāryas say that among brothers, the eldest alone takes the patrimony, but this doctrine is directly opposed to Sruti; it being without qualification laid down in that portion of the Veda denominated Taittiriya Brāhmaṇa, that Manu distributed his heritage among his sons. The same author (Āpastamba) then expresses his own opinion, “all sons that are virtuous are entitled to share.”

Primogeniture in private succession therefore ceased to have any practical importance in the Dravida school. Sarasvatīvilāsa also dismisses the subject with very short notice and says, “Equal partition without distinction is declared by the Sruti, Manu distributed wealth among his sons. Because unequal partition though found in the sacred codes, should not be instituted as it is opposed to the world and to other Srutis, it is restrictively ruled that they divide the common wealth in equal shares. Therefore, as it is not fit to be practised in this Kali Yuga, the views regarding the deductions in favour of the eldest son, are not explained.”

The Mahārāstra school also did not favour primogeniture. Nīlkaṇṭha, the author of Vyavahāra Mayukha, says, “this partition by deduction, is not respected in the Kali age, for it is one of the things forbidden in the present age, as has been already proved by me in my Sāmya Mayukha. The Venares school also adopted the same view and we are told in the

Viramitrodaya that all the sons shall have equal shares in as much as no distinction is mentioned in the Sruti, *viz.*, "Manu distributed heritage among his sons."

"मनुः पुत्रेभ्यो दायं व्यभजदिति श्रुतौ विशेषाश्रयणात् सर्वेषां पुत्राणां समोऽंश इत्यर्थः ।"

This is the place where we should notice what Jimutavāhana says about Primogeniture. At first he refers to the texts that would support the rule: "उपरते पितरि ज्येष्ठ एव धनाधिकारी नेतरः । यथा मनुः । ज्येष्ठ एव तु गृह्णीयात् पितरं धनमश्रयतः । शेषास्तमुपजौ-वेयुर्यथेव पितरं तथा ॥ ज्येष्ठोऽत्र पुत्रासु नरकव्यावर्त्तकोऽभिप्रेतो न तु जीवदपेक्षः । यथा मनुः । ज्येष्ठेन जातमात्रेण पुत्रोभवति मानवः । पितृणाम-नृणश्चैव सतस्मात्तद्धुमर्हति ॥ यस्मिन्नृणं सन्नयति येन चानन्यमश्रुते । स एव धर्मजः पुत्रः कामजानितरान् विदुः ॥" 'Is not the eldest son alone entitled to the estate on the death of the father and not the rest of the brothers? For Manu says: 'the eldest brother may take the patrimony entire; and the rest may live under him, as under his father.' And here the term eldest contemplates him who rescues his father from the hell called *put*, and not the senior survivor. "By the eldest, as soon as born, a man becomes father of male issue, and is exonerated from debt to his ancestors; such a son, therefore, is entitled to take the heritage. That son alone, on whom he shifts his debt and through whom he tests immortality, was begotten from a sense of duty: others are considered as begotten from love of pleasure."

He then explains this away by saying नेतत् सर्वेच्छाधीन जेष्ठधिकार श्रुतेः । यथा नारदः । विभ्रयादेच्छतः सर्वान् जेष्ठोभ्राता यथा पिता । भ्राता शक्तः कनिष्ठो वा शक्तपेक्षाकूलेस्थितिः । सर्वेच्छया कनिष्ठोऽपि शक्तः सन् विभ्रयादिति ज्येष्ठताचातन्त्र्यं यथामनुः । एवं सहवेसयुर्वा पृथग्वा धर्मकाम्यया । पृथग्विवर्धते धर्मस्तस्माद्धर्मया पृथक्क्रिया । सह पृथग्वेतिपदाभ्यां काम्ययेतिचेच्छया विकल्पकत्वं दर्शयति ॥ "Not so: for the right of the eldest to take charge of the whole is pronounced dependent on the will of the rest. Thus Nārada says: 'Let the eldest brother, by consent, support the rest, like a father;

or let a younger brother, who is capable, do so : the prosperity of the family depends on ability. By consent of all, even the youngest brother, being capable, may support the rest. Primogeniture is not a positive rule. For Manu declares : 'either let them thus live together, or let them live apart for the sake of religious merit : since religious duties are multiplied when apart, separation is therefore lawful.' By the term 'together' or 'apart' and 'for the sake,' he shows that *it is optional at their choice.*

According to Jimutavāhana the basis of indivisibility, as also of the primogenitary rule, is the consent of the parties. Later on while discussing the question of father's right to a double share he says, "किञ्च इतोऽपि पितामहद्वयनात् पितुर्भागद्वयं । जेष्ठस्य विंश चत्वारः सर्वद्रव्याश्च यद्वरं । ततोऽर्धं मध्यमस्य स्वारुरीयन्तु यवीयसः । तथा । एवं समुद्भूतोद्धारि समानंशान् प्रकल्पयेत् । उद्धारिऽनुद्भूते त्वेषामियं स्यादंशकल्पना । एकाधिकं हरेज्जेष्ठः पुत्रोऽर्ध्वं ततोऽनुजः । अंशभंशं यवीयांस इति धर्मोऽप्यवस्थितः । एतैर्ननुवचनैः सर्वद्रव्यवरसहितं विंशतदंशं तत्तुरीयोद्धारदार्शिताः तथा एकांशाधिकांशाधिकं चतुर्थभागाधिकभागाः प्रतिपादिताः । गौतमेनापि विंशतिभागो जेष्ठस्य मिथुनमुभयतोददद्युक्तोरथी गोवृषं मिथुनमजादौनां उभयतोदं अश्वादि तद्युक्तोरथः गायुक्तोवृषः एतत् सर्वं जेष्ठस्य । अवशिष्टं सर्वं समं विभजेरेविति प्रतिपाद्य इत्यथी वा पूर्वजः सगदेकैकमितरेषामिति सूत्रेणांशद्वयं ज्येष्ठस्योक्तं ।

नचोपार्जकत्वेन ज्येष्ठस्यांशद्वयमितिवाच्यं उद्धारिऽनुद्भूते भागद्वयस्य विधानात् अजकत्वेचोद्धारस्यासम्भवात् मध्यमकनौयसी उपार्जकतया ज्येष्ठेनापि विशेषात् तयोरर्ध्वर्धादि विधानानुपपत्तेः ज्येष्ठादिपदानर्थक्याच्च ।'

"Besides, a double share of the grandfather's wealth is the father's due according to this argument. Deductions of a twentieth part with the best of all the chattels and of half a twentieth, and of a quarter thereof, are propounded by a passage of Manu : 'if a deduction be thus made, let equal shares of the residue be allotted : but if there be no deduction, the shares must be distributed in this manner ; let the eldest have a double share ; and the next born, a share and a half ; and the youngest sons each a share ; thus the

law is settled' Gautama likewise after directing that 'a twentieth part shall belong to the eldest besides a pair of goats or sheep, a car, together with beasts that have teeth in both jaws but let the brothers divide the residue equally,' has by the following passage allotted a double share to the eldest : 'or let the first born have two shares and the rest take one apiece.' "

"It must not be argued that the eldest has double share allotted to him as the acquirer of the wealth. For the allotment of two shares is directed 'if there be no deductions : ' now a deduction could not be supposed in case of an acquisition ; and since the middlemost and youngest are not, when they are acquirers, distinguishable from the eldest, the assigning of a share and a half or other less portion would be incongruous, and the use of the term 'eldest' would be unmeaning."

Jimutavāhana takes the text of Yājñavalkya :

"न्यूनाधिकविभक्तानां धर्मः पितृकृतः स्मृतः " slightly differently. According to him it means that whatever unequal distribution is made by father will be धर्मः, legal, and cites Vrihaspati and Nārada in support of his meaning. Vrihaspati says, समन्यूनाधिकाभागाः पित्रा येषां प्रकल्पिताः । तथैव ते पालनीया विनयास्त्यस्युरन्यथा ॥ "Shares which have been assigned by a father to his sons, whether equal, greater or less, should be maintained by them. Else they ought to be chastised."

So says Nārada :

पित्रैव तु विभक्ता ये समन्यूनाधिकैर्धनेः ।

तेषां स एव धर्मः स्वात् सर्वस्य हि पिता प्रभुः ॥

"For such as have been separated by their father with equal, greater or less allotments of wealth, that is a lawful distribution ; for the father is the lord of all."

According to Vishnu : पिता चेत् पुत्रान् विभजेत् तस्य स्वेच्छा स्वयमुपाप्तेर्ये पेटामहे तु पितापुत्रयोस्तुल्यं स्वामित्वं ॥

"When a father separates his sons his will regulates the division of his own acquired wealth. But, in the estate inherited

from the grandfather, the ownership of father and son is equal."

Both Dāyatattwa and Dāyakrama Saṃgraha place unequal division on the basis of consent. According to Dāyakrama Saṃgraha "It must not be supposed that because the mode of equal division is more generally practised, and the mode by deduction seldom observed, that the former is the only mode sanctioned by law, and the latter unauthorised: for a partition by the mode of deduction may take place at *the will of younger brother* by reason of greater veneration for their elder brother." The author then points out that "the mode of equal division is the only one adopted in the present age, because younger brothers are now-a-days seldom met with, who entertain this great veneration and elder brothers deserving of it are equally rare" According to Dāyatattwa "although equal division is in conformity with the sastras, still the alternative of specific deductions, taking place out of an excess of reverence towards the senior in age, is not contradictory, in the same manner as partition or non-partition is optional with the co-heirs."

CHAPTER VIII

THE HISTORY OF PRIMOGENITURE IN BRITISH INDIA

Introductory.

The history of the law of primogeniture in British India is so intimately connected with the history of the zemindaries and principalities that the one cannot be satisfactorily treated without some preliminary examination of the other. Whatever vestiges of primogeniture might have been traceable in our law, it must have amply been evident that it is scarcely traceable in successions to private estates. It has also been seen from the Mitakshara that instead of the eldest son having any right of ownership superior to those enjoyed by his brothers, the law vests in every son, from the moment of his birth, a share in the paternal estate, and indeed gives him a sort of co-ownership by virtue of which he is even enabled to demand partition with his father and to put restraints on alienations. Yet you will hear of primogenitary rules of succession, and this will be mainly in connection with the zemindaries and principalities.

Zemindars and Talookdars as a class owe their importance to the Muhammadan period though important changes in their position with reference to the land have been worked out by the British Government. Phillips in his learned lectures on the land law of Lower Bengal inclines to the belief that the zemindars were in many cases the lineal descendants of the village Headman.¹ Colonel Galloway in his "Observations of the Law and Constitution of India"² states as follows: "The word zemindar

¹ T. L. L., pp. 31, 64, 65.

² P. 27.

generally rendered landholder, is a relative and indefinite term ; and does no more necessarily signify an owner of land than the word poddar signifies an owner of money under his charge or an aubdar, the proprietor of the water he serves up to his master ; or a soobadar, the owner of the province he governs, or in military language, the owner of the company of sepoy he belongs to ; or kelladar, the proprietor of the fort he defends ; or the thanadar, the owner of the Police Post he has charge of. On the contrary I might venture to assert that the affix 'dar,' according to the idiom of the Persian language, has more of a temporary meaning ; it imports more an official or professional connection between the person and thing connected, than a real right in the former to the latter ; as Foujdar, though the Fouj or troops are the kings' ; tehseeldar, though the rents collected belong to the Government..I say the word zemindar imports nothing more, necessarily, than that a relation exists between the person and the zumeen or land." In the Fifth Report¹ we find this observation : "The duty of the zemindar, as declared in his sunnud of appointment was to superintend that portion of country committed to his charge, to do justice to the ryots or peasants, to furnish them with the necessary advances for cultivation, and to collect the rent of Government, and as a compensation for the discharge of his duty, he enjoyed, as did the zemindars of Bengal, certain allotments of land rent-free, termed *saverum*, which were conveniently dispersed, through the district, so as to make his presence necessary everywhere, in order to give the greater effect to his superintendence."

"He was also entitled to receive certain *russooms*, or fees on the crops, and other perquisites, drawn from the *sayer* or customs, and from the quit-rent of houses. These personal or rather official lands and perquisites, amounted altogether to

about ten per cent. on the collections he made in his district or zemindary."

"The office itself was to be traced as far back as the time of the Hindu Rajas. It originally went by the name of Chowdrie, which was changed by the Muhammadans for that of Crorie, in consequence of an arrangement by which the land was so divided among the collectors, that each had the charge of a portion of country yielding about a crore of dams, or two and a half lakhs of rupees. It was not until a late period of the Mahomedan Government that the term crories was superseded by that of zemindar, which, literally signifying a possessor of land, gave a colour to that misconstruction of their tenure which assigned to them an hereditary right to the soil."

Similarly Fortescue¹ defined the position of a zemindar as a mere office. According to him a person who possessed property, obtained from other sources, might be a zemindar, but he had not that property, because he was a zemindar. "It was," he continues, "and is, the usual course for the son of a zemindar to inherit; but though that did obtain, it did not yield to him, necessarily, any proprietary right beyond what he had of his own and family; his was a right of arranging for the revenues of the extensive holding. It was a *hereditary right to perform a given duty*." And A. D. Campbell after careful scrutiny of facts also arrived at the same conclusion.² Patton in his Asiatic Monarchies had occasion to deal with the position of zemindars and he too declared that the zemindary was an office though early made hereditary.³

There has indeed been a good deal of burning agitation over the question whether the zemindars were the proprietors of the soil or were mere office holders, and Lord Cornwallis seems to have grown tired of the agitation as his vexed answer would indicate:

Zemindars, if pro-
prietors of the
soil.

¹ See "Zemindary Settlement in Bengal," App. VI, p. 118.

² *Ibid.* ³ Patton's Asiatic Monarchies, pp. 156-58; 167-74.

"The question that has been so much agitated in this country, whether the zemindars and talookdars are the actual proprietors of the soil, or only officers of Government, has always appeared to me to be very uninteresting to them ; whilst their claim to a certain percentage upon the rents of their lands has been admitted, and the right of Government to fix the amount of those rents at its own discretion has never been denied or disputed." This is what Lord Cornwallis wrote in 1790.¹ The question would have equally been uninteresting to us had it not been a fact that the determination of the rule of succession was made much to depend upon what answer was to be given to the question. If zemindary was an office, single succession would be the result when the office had already been made hereditary.² If it meant property in land, mere largeness of the estate would not take it outside the scope of the general law, and equal division should be the rule. We shall have occasion to notice how after declaring the zemindars as proprietors of the soil the same result was sought to be deduced from such a declaration.

Hereditary succession to the office of a zemindar has been often regarded by advocates of a zemindary settlement as conclusive proof of the zemindar's proprietary rights in the soil. But they forget that the tendency of everything Hindoo is to become hereditary, and the office became hereditary even prior to the Mahomedan rule. George Campbell while referring to the Hindoo predecessors of these zemindars says, "The office was semi-hereditary as

Significance of hereditariness.

¹ See Zemindary Settlement, etc., App. VI, p. 120.

² George Campbell, System of Land Tenure, etc., Cobden Club Essays, p. 165 : "Where there is a recognized chiefship or office, it is understood that it cannot be divided, one man must hold it. Great zemindaries therefore generally descended to that member of the family who was best fitted, and of whom the superior power approved. There was something corresponding to primogeniture, modified by circumstances."

almost all Hindoo offices are, that is, the fittest member of the late official's family succeeds, with approved fitness."¹ Halhed gives us an account as to how these offices gradually became hereditary and how the position of the eldest son became at the same time almost secure. Halhed says: "The mokudums are, in some pergunnahs, considered as executing their office of Purdhan or mokudum under an original hereditary right, co-equal with that which sanctions the succession to patrimonial property in the soil; in some instances, the purdhanee is included in the Zemindary claims advanced by individuals, and its existence is acknowledged by the other proprietors; instances of the office being sold by the incumbent are on record; in general, however, the Purdhan's continuance in office depends upon the degree of consideration he enjoys in the eyes of those of his fellow parishioners who are landowners, and who will, by direct or indirect means, secure his dismissal if he neglects their interests. On the office falling vacant the eldest son of the late incumbent, or a near relation, generally succeeds. But in some places the Zemindar malgoozar is considered to have the privilege of nominating a successor; without the consent of the other landowners, however, his nomination would have little weight; the difficulty of selecting a person who would attend to the interests of the Zemindar malgoozars, and at the same time prove acceptable to the ryots, appears to have originated the preference now given to the son, or nearest relation of the deceased Purdhan, who, as a matter of course, inherits no inconsiderable portion of the local and personal authority possessed by his predecessors and would be equally open to the influence of that species of corruption by which the greater malgoozars retain their power."² And Holt Mackenzie

¹ Systems of Land Tenure in Various Countries (India), Cobden Club Essay, p. 159.

² Halhed's "Memoirs on the Land Tenure and Principles of Taxation in the Bengal Presidency."

expresses an opinion that previous to the permanent settlement there was no such system of regular subdivision of zemindaries amongst the heirs of the zamindar. In some cases a zemindaree seems to have been regarded as an office generally of little value. In others there appears to have prevailed a special custom of primogeniture." This right of primogeniture did prevail, according to Holt Mackenzie, in all the provinces.¹

But though zemindars were not proprietors of all the lands of their zemindary, though zemindary was mere office, there was nothing to prevent them from owning lands of their own. It is quite possible that these should also have, like others, private lands of their own. Indeed even if the view that the zemindary was a mere office be correct, it is by no means opposed to the fact that nearly all the zemindars, from the highest to the lowest, were also themselves cultivators to a greater or less extent.² The petty head of the village, besides being a zemindar, was also, perhaps, the greatest cultivator in his own neighbourhood; and each of the higher grades of zemindars even to the tributary sovereign of the hills, had his private lands, whence

¹ Similar reply is given by Mirza Mohsen to questions put by Rouse. See Rouse's Dissertation concerning landed property in Bengal, 1791, p. 54. See also Roy Royan's answers:—

"The Zemindars of a middle and inferior rank, and the talookdars and murkoories at large, hold their lands to this day solely by virtue of inheritances whereas the superior zemindars (Chowdhuries), such as those of Burdwan, Nuddea, Dinagepur, etc., after succeeding to their zemindaries on the ground of inheritances, are accustomed to receive, on payment of a nuzzerana, peskush, etc., a dewanny sunnud from Government. In former times the zemindars of Bishnupur, Pachete, Beerbhom, and Roshmabad,—used to succeed in the first instance, by the right of inheritance and to solicit afterwards, as a matter of course, a confirmation from the ruling power.

² A. D. Campbell's 'Able Paper,' 1832, quoted in Zemindary Settlement, etc., App. VI, p. 119.

he drew grain and other supplies for domestic purposes of his. "The fields which he held in his distinct capacity as a cultivator, were never in the slightest degree, confounded by the native governments with his official contract or zemindary tenure."¹ Rules of succession to such lands, so long as kept distinct, must be very different from the one that would govern succession to zemindary. But, as we shall see later on, such confusion could not always be avoided. And when permanent settlement in Bengal declared the zemindars to be the proprietors of the soil of the zemindary, there was little reason for keeping the two separate and distinct. As we go on we shall see how circumstances rendered it even a matter of policy to acknowledge the zemindar in the new light of the landed proprietor of all lands, not only of his own fields, but of every field within his entire zemindary or hereditary revenue jurisdiction.

Besides his own fields and his zemindary a zemindar also received a grant of waste land from the Government, and this grant has been criticized by many able writers as the one not warranted by the Act, under the authority of which the Permanent Settlement was made. It is Act 24, Geo. III, Cap. 25, Sec. 39, and this runs as follows :— "And whereas complaints have prevailed that divers rajahs, zemindars, polygars, talookdars and other native land holders within the British territories in India have been unjustly deprived of ; or compelled to abandon and relinquish their respective lands, jurisdictions, rights and privileges ; or that the tributes, rents, and services required to be by them paid or performed for their respective possessions to the said united company are become grievous and oppressive ; and whereas the principles of justice and the honour of this country require that such complaints should be forthwith enquired into and fully investigated and if founded on truth,

¹ *Ibid.* See also Patton's Asiatic Monarchies, p. 156.

effectually redressed ; be it therefore enacted that the Court of Directors of the said united company shall, and they are hereby accordingly required, forthwith to take the matter into their serious consideration, and to adopt, take, and pursue such methods for enquiry into the causes, foundation, and truth of the said complaints, and for obtaining a full and perfect knowledge of the same, and of all circumstances relating thereto as the said Court of Directors shall think best adapted for that purpose ; and thereupon according to the circumstances of the respective cases of the said rajahs, zemindars, polygars, talookdars and other native landholders, to give orders and instructions to the several governments and presidencies in India, for effectually redressing in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the said rajahs, zemindars, polygars, talookdars, and other native land holders may have sustained unjustly in the manner aforesaid, and for settling and establishing upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services shall be in future rendered and paid to the said United Company by the said rajahs, zemindars, polygars, talookdars and other native land holders."

By the Act, the Court of Directors were required to give orders for settling and establishing, "upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which the tribute, rents and services of the rajahs, zemindars, polygars, talookdars and other native land holders should be in future rendered and paid." The zemindars who had been displaced were to be restored, and their situation, as much as possible, rendered permanent. But it was hardly consistent with the declared policy of this Act to take any steps or make any declaration which would ultimately have the effect of dismemberment of these zemindaries. This however, as we shall show, was the object in view of which zemindars were declared proprietors of the soil.

It has been noticed above that Halhed refers to some record which would point to alienation of office by the present holder. But so long as it was a mere office, alienation of it could hardly be thought of. We have seen how gradually these offices became hereditary. But still it retained the character of office, it being still held descendible to a single successor; and before that eventful declaration made by the British Government which turned these zemindars into proprietors of the soil, it was inalienable. "At the same time that property in land was recognized by the Regulations of 1793, it was made freely transferable by sale, and in every respect put on the footing of property." This was indeed quite logical, and really consistent with the declaration. But this too has helped the dismemberment of large zemindaries, and we do not know whether this too was foreseen by the propounders of the declaration.

I shall have occasion to say more on this subject as we proceed. But this is the place where we must notice the principal origins to which our zemindars can be traced.¹ :—

First. Old tributary rajas, who have been gradually reduced to the position of subjects but have never lost the management of their ancient territories, which they hold rather as native rulers than as proprietors. Here the primogenitary rules will still be found and these zemindars are chiefly found in outlying border districts and jungly semi-civilised countries.

Second. "Native leaders, sometimes leading men of Hindoo class, sometimes mere adventurers, who have risen to power as guerilla plunderers levying blackmail, and eventually coming to terms with the Government, have established themselves under the titles of zemindars, polygars, etc., in the control of tracts of country for which they pay revenue or tribute."

Third. The officers whose business was to collect and account for the revenue and who in disturbed times gained

¹ See Cobden Club Essay (India), p. 164.

such a footing that their rendering of an account became almost nominal. Dr. Hunter gives us a lucid explanation of the manner in which, under the lax rule of the Musalmans, the zemindars and talookdars grew from mere revenue officers and local representatives into position of proprietors.¹ This last class of zemindaries ought also to have descended by some rule of single succession. But at least after the declaration made by Lord Cornwallis these are also proprietors of the soil and as property in land descends to all the sons equally, we shall not be surprised to see these divisible and descendible to many.

We have adverted to some policy of Government disfavoured by impartiality or rather encouraging partiality of zemindaries. Yet for reasons best known to the authorities the counter policy of encouraging impartiality was entertained for some districts and we shall see how legislature recognised the custom of primogeniture at least prevailing in those districts.

The ultimate right of the state to determine by legislative enactment the conditions under which property in land shall be acquired, enjoyed and transmitted by its subjects has seldom, if ever, been questioned either by philosophers or by politicians, or by the landowners themselves. Yet when the East India Company recognised the zemindars of Bengal as the landed proprietors many raised the question how far it was competent for the Government by that act to transfer or convey to the zemindars any proprietary right other than what the Government then might have possessed. According to these objectors the company itself, though sovereign of India, had vested in it only the right of collection of the public revenue, the proprietors of the soil being the cultivators ; and consequently ' a Sunnud, firman, or by whatever name a grant from the crown may be called ' would convey no right higher than that of collection of

Impartiality disfavoured.

Legislative activities relating to primogeniture.

¹ Hunter's Orissa, Vol. II, pp. 214-230, 239, 240, 255-261.

revenue. They went further and asserted that even a Muham-madan emperor was only the proprietor of the revenue, and not of the soil: and "hence it is, when he grants aymas, altumgahs, and jaggeers, he only transfers the revenue from himself to grantee."¹

Whatever that be, while effectuating Permanent Settlement with zemindars the Government did declare the zemindars to be the proprietors of the lands in the zemindaries and it is not for us to enquire whether by this "there was brought about the discordance between truth, right and fact on the one part, and the conclusion on which the Government acted." Halhed in his "Memoir on the Land Tenure and Principles of Taxation" examines the policy of the Government regarding this declaration and is of opinion that the zemindars were recognised as proprietors to evade jurisdiction of the Supreme Court. "The Government feared that a judicial enquiry into the Zemindars' rights and tenures, whenever it shall happen, is likely to have important consequences on the Government of this country; should it be determined that a Zemindar is an hereditary office, who collects the revenue in trust for Government, whose jama is fixed only to prevent embezzlement, and who is liable to be removed at will, it will be argued, and on plausible grounds, that every Zemindar is a servant of the company, an officer of Government, and, therefore, subject to the jurisdiction of the Court; should it, on the other hand, be decided that a Zemindar is an absolute proprietor of his Zemindary, in every instance where he is dispossessed he may reclaim his right thus established by a process in the Supreme Court against the Company, contest the grounds on which he is excluded from possession, or on which his land is assessed; in short, in whatever way the question may be decided it is likely to open a wide field for litigation, and serve to involve this Government in suits brought either, directly against the Company,

¹ Col. Galloway's "Observations on the Law and Constitution of India," p. 13.

or can be defended only by them and their officers the course adopted to obviate the natural consequences of the interference of the Supreme Court with the agents of the revenue department, was perhaps the most injudicious which could have been taken; the Advocate-General (Sir John Day), taking the Persian words in their literal sense, declared the Zemindars to be landholders, and therefore not amenable to the jurisdiction of the Supreme Court; on this the Government acted, and induced the Zemindars to plead against the jurisdiction.....On this verbal translation of the term 'Zemindar' a new doctrine was founded and very generally embraced: "the Governor-General and his Council were committed in their opinions to vindicate the plea set up against the jurisdiction of the Supreme Court, by admitting that the Zemindars were landholders, and held their right and land by inheritance; and opinions so well calculated to suit the prejudices of the people of England, who were generally unacquainted with the principles of the Eastern Governments, had a powerful influence in establishing a belief in the new doctrine, and finally overruling the disputed jurisdictions of the Court."¹

Whatever might have been the reason, whether the Company had any such ulterior object in view or whether it was due to an erroneous inference drawn from the fact of hereditary succession, that this declaration was made, it is an important declaration in the history of Primogeniture. That the declaration might have been due to mistake is reflected in the view taken by Patton who in his *Asiatic Monarchies* says: "the prejudices of Europe confirm hereditary establishments wherever they are to be found, and, if it be possible, convert them into tenures of land, because, among the English in particular, the law of Primogeniture and hereditary succession applies peculiarly to landed property; nor can they suppose the hereditary rule to be followed in the disposal of a trust, or an

¹ Halhed's *Memoirs*, App. A, pp. ii to vi.

office, which has a reference to land, 'without annexing' to it the whole property of the official district, however extensive may be its boundaries: the argument is that hereditary succession implies property of land."¹

Hereditary succession to the zemindary has been regarded by those unaccustomed to think of hereditary offices as conclusive proof of the zemindar's proprietary rights in the soil. These very authorities were also accustomed to single succession in landed property, and it might have been expected that when the self same rule of succession they found in the zemindaries, there would be nothing in their way to help the development of primogeniture. But the fates determined otherwise. It is difficult to say why the Government soon after declaring that the zemindars were the proprietors of the soil proceeded at once to do away with the primogenitay rules. A Revenue letter from Bengal dated the 6th March 1793 says, "the same principles which induced us to resolve upon the separation of the talooks, prompted us to recommend to you, on the 30th March 1792, the abolition of a custom introduced under the Native Governments by which most of the principal Zemindaries in the country are made to descend entire to the eldest son, or next heir of the last incumbent, in opposition both to the Hindu and Mahomedan laws, which admit of no exclusive right of inheritance in favour of primogeniture, but require that the property of a deceased person shall be divided amongst his sons or heirs, in certain specified proportions. Finding, however, upon a reference to your former orders, that you had frequently expressed a wish that large Zemindaries should be dismembered, if it could be effected consistently with the principles of Justice, we did not hesitate to adopt the measure without waiting for your sanction."²

¹ Patton 'Asiatic Monarchies,' pp. 195-196.

² Select Committee, 1810. App. No. 9, p. 100.

Revenue Letter from Bengal of the 6th March, 1795.

See also Francis' "Revenue of Bengal," p. 59.

Quoted in "the Zemindary Settlement in Bengal."

Dismemberment—
the policy of the
Government.

The dismemberment then was the real policy and one shall not be surprised if some day it would be established that it was with this object in view that the seemingly favourable declaration of the proprietary right was made, so that consistently with the principles of justice dismemberment could be effectuated. The measure referred to in the Revenue letter from Bengal just noticed was the Regulation XI of 1793, "a Regulation for removing certain *restrictions* to the operation of the Hindoo and Mahomedan laws, with regard to inheritance of *landed property* subject to the payment of Revenue to Government," and its object was announced as follows: "A custom, originating in consideration of financial convenience, was established in these provinces under the Native administrations, according to which some of the most extensive Zemindaries are not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son, or next heir of the deceased, to the exclusion of all other sons or relations. This custom is repugnant both to the Hindoo and Mahomedon laws, which annex to Primogeniture no exclusive right of succession to landed property, and consequently, subversive of rights of those individuals who would be entitled to a share of the estates in question, were the established laws of inheritance allowed to operate with regard to them as well as all other estates. It likewise tends to prevent the general improvement of the country from the proprietors of these large estates not having the means, or being unable to bestow the attention requisite for bringing into cultivation the extensive tracts of waste land comprised in them. For the above reasons and as the limitation of the public demand upon the estates of individuals as they now exist, and the rules prescribed for apportioning the amount on the several shares of any estates which may be divided, obviate the objections and inconveniences that might have arisen from such divisions when the public

demand was liable to annual or frequent variation, the Governor General in Council has enacted the following rules."

So the avowed object of this regulation which signed the death warrant of primogenitary rules in zemindaries was the removal of a custom repugnant to the laws of the country, a custom subversive of the rights of individuals; the Regulation according to this had in view the securing to the sons of zemindars their birthrights given to them by their own personal laws, rights that had been taken away from them by the custom, and such a custom took its birth in the sense of financial convenience. Native administration was to blame for this, and the new Government was bent upon rectifying the error. The custom no doubt was already an established one; yet as it tended to prevent the general improvement of the country, the Government would be failing in duty if it would hesitate on that score to condemn and remove it.

If this was the honest opinion of the authors of the Regulation it could arise only because of their ignorance of the history of the zemindars. No doubt both in the Articles of the Proclamation relative to the limitation of the public demand upon the lands, and in the regulation into which the said proclamation was subsequently enacted,¹ these authorities spoke of "Zemindars independent taluqdars and *other* actual proprietors of land paying revenue to Government," and both in the decennial settlement and the Permanent Settlement of Public Revenues of the Province, the Settlement purported to be made with or on behalf of the proprietors of land; yet from

¹ Bengal Permanent Settlement Regulation 1793 (Regulation I of 1793). It will be interesting to notice here how the middlemen or the tenureholders grew under the system. The Permanent Settlement had been so jealous of the growth of intermediate tenures, that it prohibited the Zemindars from giving away any lease for longer than twelve years. See Reg. XLIV of 1793, Sec. 2.

See Bengal MS. Records, Hunter, Vol. I, p. 100.

what has already been said about those so called actual proprietors of land, it would appear that either this was due to total ignorance of the history of the institution or it was only a wilful mis-statement made with the object of rendering the fulfilment of some frequently expressed wish possible and consistent with the principles of justice. If zemindaries were really properties in the soil, if instead of being mere officers of the crown these zemindars were really proprietors of land, there might have been some truth in the remarks that the primogenitary rule of succession in zemindaries was repugnant to the law of the country and was subversive of the rights of the individuals.

Whatever be the nature of property in the zemindaries, the custom of primogeniture could grow, and it is indeed difficult to see how such a custom would develop if indeed it was repugnant to the law of the country and subversive of individual rights. Every custom necessarily involves the two conceptions of the conviction and the constant and general use which have the mutual relation of a basic principle and an external expression. It takes its birth in some need felt by the society; and satisfaction of such need might have been obtained, in the beginning, through some transitory and isolated acts gradually giving rise to a general conviction, of the necessity of such satisfaction. Thus it is that almost in every system of law we find a high place accorded to custom: and neither the Hindu system nor the Muhammadan one can be accused of scant respect to it. If then the custom could develop in the country it would hardly be justifiable for a Government to declare war against it unless of course it was against some policy of the Government.

Undoubtedly land unlike almost every other form of riches, is strictly limited in amount; and any condition of the law which tends to restrict the chance of acquiring a thing, in itself desirable but limited in quantity, to a small fraction

Custom, if can be repugnant to the law of the country.

of the entire population, may be regarded as *prima facie* objectionable, if not unjust. As a matter of fact, the majority of European countries have from time to time passed laws intended to prevent the accumulation of extremely large quantities of land in the hands of comparatively few proprietors. Yet it cannot be too strongly urged that the less we have to do with such laws the better. The more a state finds itself able to trust to the public spirit, intelligence and enterprise of its individual members, and the more, in consequence of the existence of such characteristics, it feels able to leave them at liberty to administer and dispose of their property without external interference, the healthier will be the general condition of such a state, and the more certain and rapid its progress in industrial and agricultural improvement. It cannot of course be said that there can be no occasion for legislative interference; but we may at least contend that it always requires justification.

. But the justification of legislative interference here was that the custom itself did grow only under external pressure, and it was fit to remove that pressure. The custom could grow, the authors of the Regulation would say, only in consideration of financial convenience; and if the crown could afford to give up this consideration, the pressure ought to be removed. This no doubt will be a real justification of legislative interference provided the interference did nothing more than the removal of the restriction. It becomes necessary therefore for us to examine the provisions of the Regulation.

The second clause of the Regulation enacts that "after the 1st July, 1794..... if any Zemindar, independent talookdar or other actual proprietors of land, shall die without a will, or without having declared by a writing or verbally to whom and in what manner his or her landed property is to devolve after his or her demise, and shall leave two or more heirs who by the Mahomedan or Hindoo law (according as the parties may be of the former or latter persuasion) may be respectively entitled to

succeed to a portion of the landed property of the deceased, such person shall succeed to the shares to which they may be so entitled."

In its third clause the Regulation enacts: "If any Zemindar, independent talookdar or other actual proprietor of land, shall die subsequent to the period specified in section II, without a will or without having declared by a writing or verbally, to whom and in what manner his or her landed property is to devolve after his or her demise, and shall have two or more heirs who, by the Mahomedan or Hindoo law (according as the parties may be of the former or latter persuasion) shall be respectively entitled to succeed to a portion of the landed property of the deceased, under the rule contained in that section, such person shall be at liberty, if they shall prefer so doing, to hold the property as a joint undivided estate. If one or more or all of the sharers, shall be desirous of having separate possession of their respective shares, a division of the estate shall be made in the manner directed in Reg. XXV of 1793 and such sharer or sharers shall have the separate possession of such share or shares accordingly. If there shall be three or more sharers, and any two or more of them shall be desirous of holding their shares as a joint undivided estate, they shall be permitted to keep their shares united accordingly."

If then dismemberment of the large zemindaries was the object in view of this Regulation it did not take the bold step of substituting for primogeniture the law of compulsory partition which would produce the desired effect immediately. Indeed the English at home was also questioning the propriety of the retention of primogenitary rules, and if primogeniture could survive the manifold attacks in England it was perhaps due to the fact that one fatal objection to the system did not exist in England; political privileges were not in the slightest degree associated with the ownership of land; the occupier of the meanest tenement in a borough, or of half a dozen acres of soil in a rural district, had as much right to his representative

in Parliament, and the same share in his return, as the owner of half a county. The other objection, the objection put forward by the economists, could not prove fatal. The economists were never unanimous in regarding with disfavour the concentration of rural property in the hands of comparatively few proprietors. Nor were they sure that such a system would be more injurious than the inevitable ultimate consequences of any alternative system which the ingenuity of legislators could devise. The doubt felt was so strong that when the landowners of England were given the free power of disposal by will they did utilize it only in creating the custom of primogeniture in the place of compulsory primogenitary rules.

The legislature which gave us the Regulation was the product of the above system, and accustomed at home to the various attacks on primogeniture, and probably having in view their own system of entails they wanted to take away the compulsion, at the same time keeping it open for our landowners to see if they would avail of the testamentary power given to them in creating anything like English entails. Nothing contained in the Regulation is to be construed to prohibit any actual proprietor of land bequeathing or transferring by will, or by a declaration in writing or verbally, either prior or subsequent to the 1st July, 1794, his or her landed estate entire to his or her eldest son or next heir, or other son or heir, in exclusion of all other sons or heirs or to any person or persons, or to two or more of his or her heirs in exclusion of all other persons or heirs in the proportions, and to be held in the manner which the proprietor may think proper.....(provided the bequest be not repugnant to the Hindoo or Mahomedan Law).

But the testamentary power of the Hindoos and Mahomedans was not as wide as in the English system. And if primogenitary rule did not survive this legislative attack it was greatly due to this fact. This is how dismemberment became possible, and if we hear of no war waged against it by the people concerned, it was because of the gradual and pacific manner in

which it was effectuated. Any violent and summary declaration abolishing primogeniture might meet with strong oppositions.

The legislature in enacting the Regulation was of opinion that primogeniture tended to prevent the general improvement of the country. Lawrence¹ writing for English primogeniture says: "Many writers have in recent times advocated the adoption in our own country of some system having for its object that equalisation of property which the legislators of Greece and Rome with more or less earnestness, but invariably with small success, endeavoured to establish, and which the succession laws of modern times have in other lands in great measure succeeded in effecting. The right of the State to control, direct, or modify the method in which land is owned and occupied by its subjects has already been shewn to be one which may be legitimately asserted. I have also endeavoured to show that it is one of these latent rights of which only extreme and urgent necessity justifies the exercise; and it remains to inquire whether the present conditions of tenure in England are such as imperatively to demand the interference of the legislature, or whether they are not on the contrary of such a character that any amelioration which might be thus effected would be more than counterbalanced by the pernicious feeling of insecurity which such interposition must inevitably create."

He then reviews the question as to the number of landed proprietors in England and, after noticing that according to the best obtainable information, at least seventy per cent. of the estates in England are held under settlement, proceeds to consider whether the operation of the custom of primogeniture is so pernicious in its effects on the system of land tenure, and so injurious in its economical, social, or political aspects as to imperatively require the interference of the legislature in the shape of a new land law. The result of his consideration is an

¹ The Law and Custom of Primogeniture, p. 76.

answer to the above question in the negative. "There appear to be," he says, "many reasons for considering the circumstance that land is a commodity mainly held in large quantities by men of wealth,—often by men who would be richer if they possessed no land at all—as favourable to the utmost possible production and the highest development of the riches of the soil. The capitalist who owns land is able to introduce improvements, to venture on experiments and await his reward in the course of years to come, the petty occupier is obliged to grow what is immediately remunerative, and cannot afford to look beyond the necessities of the moment to the possibilities of the future." These conclusions he justified "by facts, so far as they can be verified, and by figures, so far as they can be regarded as trustworthy."¹

If this is so for England, it is difficult to see why it would be otherwise for India. In fact the authors of the Permanent Settlement in Bengal put forward the same reason for retaining the zemindars and raising them from mere officers to the proprietors of the soil. "It is for the interest of the State," says Lord Cornwallis, "that the landed property should fall into the hands of the most frugal and thrifty class of people, who will improve their lands and protect the ryots, and thereby promote the general prosperity of the country."² The author of the Permanent Settlement thought that "if there be any hidden wealth still existing it will then be brought forth and employed in improving the land, because the proprietor will be satisfied he is labouring for himself." "A Permanent Settlement alone can make the country flourish, and secure happiness to the body of the inhabitants."³

Whatever that be, on grounds similar to those stated in the preamble to Regulation XI of 1793, Regulation XLIV was

¹ Lawrence, p. 82.

² Fifth Report, p. 473.

³ Regulation X of 1800, Sec. II.

passed for removing certain restrictions to the operation of the Hindoo and Mahomedan laws with regard to the inheritance of landed property, subject to the payment of revenue to Government in the Province of Benares which was equally directed against the primogenitary rules or rather against unification of holdings.

It has been seen that before these legislative measures were adopted a custom was established in those provinces under the native administrations according to which the extensive zemindaries were not liable to division. The legislature, fully aware of that custom proceeded to remove it characterising it as originating only in consideration of financial convenience. A few years later, in 1800,¹ a Regulation was passed which had the opposite object in view,—a Regulation for preventing the division of landed estates in the Jungle Mehals of the Zillah of Midnapore and other districts. This Regulation declared that Regulation XI of 1793 shall not be considered to supersede or affect any established usage which may have obtained in the Jungle Mehals of Midnapore and other districts, by which the succession to landed estate, the proprietors of which may die intestate, has hitherto been considered to devolve on a single heir, to the exclusion of the other heirs of the deceased. In the mehals in question, the local custom of the country shall be continued in full force, as heretofore, and the courts of justice be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those mehals.² The reason for this retrograde move is given in Section I of the Regulation which says: "By Regulation XI of 1793, the estates of proprietors of land dying intestate are declared liable to be divided among the heirs of the deceased, agreeably to the Hindoo or Mahomedan laws. A custom, however, having been found to prevail in the Jungle Mehals of

¹ Regulation X of 1800.

² Regulation X of 1800, Sec. II.

Midnapore, and other districts, by which the succession to landed estates invariably devolves on a single heir without the division of the property, and this custom having been long established, and being founded, in certain circumstances, on local convenience which still exists, the Governor-General in Council has enacted the following rule to be enforced in the Provinces of Bengal, Behar and Orissa from the date of its promulgation."

This limits the operation of Regulation XI of 1793 and to a certain extent helps the revival of primogeniture in that limited area. It must have been noticed above that the custom of primogeniture in these localities is also said to have originated in the consideration of some local convenience. In fact every custom takes its birth in the sense of convenience, and this is why certain amount of respect is always due to it.

The sense of respect due to custom marks this Regulation X of 1800. The same feeling we find in the judgment of the Judicial Committee in *Babu Beerpertab Shahi vs. Maharaja Rajendra* decided half a century afterwards.¹ In this case the question of succession to the zemindary of Hunsapore in Behar was to be decided. The zemindary was originally an impartible Raj, which by family usage and custom descended, for many generations, on the death of each successive Rajah, to his eldest male heir, according to the rule of primogeniture. In the year 1767 the then reigning Rajah of Hunsapore having rebelled against the British Government, was expelled by force of arms, and the Raj confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately in 1790 granted the Raj to a younger member of the family. It was argued that after this grant the zemindary would not retain its previous incidents as at the time when this grant was made, the policy of the Government which made the grant as evidenced by Regulation XI of 1793, was to reduce the number of the estates descendible by special custom, and the intention of

¹ 12 M. I. A. (1867).

Lord Cornwallis' government was presumably to restore the property to the old family subject to the ordinary law of succession.¹ We shall have occasion to discuss this later on. All that we should notice here is that in this case it was judicially announced that Bengal Regulation XI of 1793, does not affect succession by special custom of a single heir to a Raj, or subject it to the ordinary Hindoo law of succession.

It may not be quite out of place here to notice the effect of Permanent Settlement on the ancient Raj families of Bengal. It has already been noticed how the Permanent Settlement had been jealous of the growth of intermediate tenures. In the very year of the Settlement a Regulation was passed prohibiting the zemindars from giving any lease for a period longer than twelve years.² The result of this policy was the ruin of the ancient houses of Bengal. "It was vain to expect the ancient Rajas of Bengal, encumbered with all the costly paraphernalia of their petty courts and military retainers, to suddenly transform themselves into punctual tax-collectors. Yet this was exactly what the Permanent Settlement did expect of them. It applied to their pompous, lax and extravagant system of management, the same stringent procedure as it applied to the new class of zemindars with their shrewd habits of business..... The ancient houses of Bengal broke down under the strain..... The wave of the Permanent Settlement had, in truth, submerged the ancient houses of Bengal." ³ "In fact it is scarcely too much to say that, within the ten years that immediately followed the Permanent Settlement, a complete revolution took place in the constitution and ownership of the estates which formed the subject of that Settlement."⁴

¹ 12 M.I.A. 1, p. 37.

² Regulation XLIV of 1793. . .

³ Hunter's Bengal MS. Records, Vol. I, p. 101.

⁴ *Ibid*, pp. 101-102. Official report on the Revenue Administration of the Lower Provinces of Bengal, by Mr. J. Mavneile, p. 9, Cal. 1873.

This prohibition of 'Sub-infeudation,' if we may use this feudal 'phraseology,' was however not respected by one ancient family of Bengal which, by taking to sub-infeudation, could make itself the one conspicuous exception amid the general ruin. The Raja of Burdwan soon gave up the struggle to manage his estates under the hard-and-fast rules laid down by the Permanent Settlement, and leased them out in perpetuity to middlemen. These intermediaries did the actual work of collecting the land tax, paid a fixed sum each year to the Raja, and made as much more as they could out of the cultivators. Others gradually discovered that this system formed the only escape from ruin, and after some hesitation, the Government found itself compelled to recognise the new state of things. "Within twenty years after the Permanent Settlement the practice had got beyond the control of the Government, and the twelve years' restriction on leases was formally abolished" by Regulation V of 1812. Regulation VIII of 1819 in its preamble recorded how the practice of sub-infeudation grew and gave to the practice the force of law placing on a legislative basis the modern system of sub-infeudation in Bengal.

Whatever that be, prior to the Hunsapore case, *Rajah Deedar Hossein vs. Ranee Zuhooroon-Nisa*¹ was decided in 1841 by the Judicial Committee in which the Committee declared that the family usage that a zemindary had never been separated but devolved entire on every succession, though proved to have existed as the custom for many generations, will *not* exempt the zemindary from the operation of Regulation XI of 1793, and that Regulation X of 1800 does not apply to undivided zemindaries in which a custom prevails, that the inheritance should be divisible, but only to Jungle Mehals, and *other entire districts* where local customs prevail.² It was attempted in this case to construe Regulation X of 1800 in a

¹ 2 M. I. A. 441.

² 2 M. I. A. 441 at p. 476.

way that would have the effect of repealing Regulation XI of 1793, saying that Regulation X would apply to the case of every individual Zemindary in which the custom had been that it should descend entire. This construction however was not accepted.

It has been noticed that in the Province of Bengal, Behar and Orissa the authors of the Permanent Settlement made a great assumption that the zemindars and independent talookdars were the proprietors of the soil, and starting with that assumption they shaped the law governing the incidents of such zemindaries. In Madras however a Regulation was passed declaring the proprietary right of lands to be vested in individual persons, and defining the rights of such persons under a Permanent Assessment of the land revenue. The preamble to Madras Regulation XXV of 1802 stated that "whereas it is known to the Zemindars, Merassydars, ryots and cultivators of land in the territories subject to the Government of Fort St. George, that, from the earliest until the present period of time, the public assessment of land revenue has never been fixed; but that, according to the practice of Asiatic Government, the assessment of the land revenue has fluctuated without any fixed principle for the determination of amount, and without any security to the Zemindars or other persons for the continuance of a moderate land-tax; that, on the contrary, frequent enquiries have been instituted by the ruling power, whether Hindoo, or Mahomedan, for the purpose of augmenting the assessment of the land revenue, that it has been customary to regulate such augmentations by the inquiries and opinions of the local officers appointed by the ruling power for the time being; and that in the attainment of an increased revenue on such foundations, it has been usual for the Government to deprive the Zemindars, and to appoint persons on its own behalf to the management of the Zemindaries, thereby reserving to the ruling power the implied right, and the actual exercise of the proprietary possession of all lands whatever; and whereas it is

obvious to the said Zemindars, Merassydars, ryots and cultivators of land that such a mode of administration must be injurious to the permanent prosperity of the country by obstructing progress of agriculture, population and wealth, and destructive of the comfort of individual persons by diminishing the security of personal freedom and of private property: wherefore, the British Government, impressed with a deep sense of injuries arising to the state and to its subjects from the operation of such principles, has resolved to remove from its administration so fruitful a source of uncertainty and disquietude to grant to Zemindars and other *land-holders*, their heirs and successors, a *permanent property* in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances." Deeds of permanent property—a Sunnud-i-milkeat istimrar—were to be granted to all the proprietors according to this Regulation and these proprietors were declared to be at liberty to transfer the proprietary right in the whole or in a part of their zemindaries.¹

We have seen elsewhere what was involved in this declaration in favour of the zemindars. If zemindary were a mere office, there would naturally be single succession to it even when it became hereditary. Now that it is a property in land the ordinary law of succession and inheritance would apply.

It may be noticed here that in Madras at least the legislature had to recognise such a thing as the existence of hereditary offices. In Section XI of the aforesaid Regulation office of Curnum is mentioned, and though the Curnums can be appointed from time to time by the zemindars, the zemindar shall in the first place select a successor from the family of the

¹ Madras Regulation XXV of 1802, Secs. III and VIII. From the passing of this Regulation Kaye draws the moral that Permanent Settlement in Bengal must have proved a great success. See his "History of the Administration of the East India Company."

last incumbent, and Regulation VI of 1831 of Madras enacted that the emoluments annexed to various hereditary village and other offices as wages for the performance of such services, shall in no case be separated from the offices to which they have been annexed. Possibility of division of such property would therefore be the minimum.

The Madras Regulation speaks of grants made by the Government to the zemindars. If zemindars become the proprietors of the soil it is by this crown grant, and we shall have occasion later on to discuss the scope of these grants. We should however notice here that assuming that Government has power of making grants of landed property, it can, by its grants, limit in any way it pleases the descent of such lands. Scarcely any authority is needed for the proposition that crown has such power. Yet the decision of the Judicial Committee in *Thakur Rajendra Bahadur Singh vs. Rani Raghubans Kunwar*¹ would support it amply ; and whatever doubts as to this power might have been felt in any quarters the Crown Grants Act (XV of 1895) announces that Crown has the power.

I shall not deal with the Oudh Estates Act—Act I of 1869—here as occasion for saying something about it would arise later. There you will find provisions reserving a certain place for primogenitary rules in the estates of certain Oudh taluqdars.

The Crown no doubt has the power. But a subject has
Crown grants.
no right, either by express declaration or by mere volition, to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent.² In no system of Jurisprudence it is thought competent for an individual to legislate for himself.

¹ 45 I. A. 134-23 C. W. N. 101 (P.C.)

² *Rajendra Bahadur vs. Rani Raghubans*, 45 I.A. 134.

See also *Tagore vs. Tagore*.

Before the passing of the Oudh Estates Act several grants of estates had been made by the Crown, and the rule of succession to these estates found place in the Sanad creating the estate. In cases of possible inconsistency between the order of succession specified in the Sanad and that in the subsequently enacted statutes, it has sometimes been questioned as to which should govern. We shall have occasion to discuss these things more in detail in a subsequent chapter. All that we should notice here is that the Judicial Committee had to deal with similar questions in *Devi Baksh Singh vs. Chandrabhan Singh*,¹ and the answer there given seems to favour the position that the Statute should govern such cases.

If rules of descent given in a Sanad is, to the extent specified above, superseded by a subsequently enacted Statute, the next question might be raised how far the primogenitary rules of descent prevailing in any family can be affected by such Statutes. In *Bhai Narindar Bahadur Singh vs. Achal Ram*² the point was raised and a decision was given on it by the Judicial Committee in favour of the Statute. Lord Hobhouse in delivering the judgment said "the question in this case has come to a very simple point indeed after all this litigation. The estate is in Oudh and was granted by the Crown to one Pirthi Pal after the confiscation, and it is placed in class 2 of the Act I of 1869 and not in class 3. The effect of that is that the estate is labelled as one which, according to the custom of the family, descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the *act*; though if two collaterals or persons in the line of heirship are equal in degree,

¹ I. L. R. 232 All. 588 (P. C.).

² 20 I.A. 77-20 Cal. 649 (P. C.).

then as the property can go only to one, recourse must be had to the seniority of line to find out which that one is."

We shall conclude these remarks by noticing another Statute where also primogeniture received a welcome recognition at the hands of the legislature. The Punjab Land Revenue Act and the rules framed under that Act recognize primogenitary rules using the expression "nearest eligible heir according to the rule of Primogeniture" in rule 17 (ii).

An interesting question was raised in a case arising under that Act: whether the rule of primogeniture would embrace descent to adopted son or whether it was confined to that by birth only. The question arose in connection with a vacancy in the office of headman, and the Financial Commissioner, Mr. Fenton,¹ had to give his answer to it. Mr. Fenton after reviewing several previous decisions² arrived at the conclusion that primogenitary rules as contemplated in the rule did not embrace descent by adoption. Mr. Speedman in *Hira vs. Wazira* gave his reasons for the rule saying "adoptions are very often made to spite the heirs. I do not think that a Lambardar should be able to gratify private spite by imposing a lambardar on the village whom the villagers must dislike." It is indeed difficult to follow this reasoning though it appealed to Mr. Fenton as good reason.

In the Central Provinces the Land Revenue Act³ of 1881 in its section 65A provides that when, on the death of a protected thikadar, there are two or more heirs bearing the same relationship to him, the eldest of such heirs shall succeed:

¹ Bhagsingh *vs.* Jawra Singh, 15 I.A. 925.

² *Hira vs. Wazira*, 9 P. R. 1892 Rev.

Maula vs. Hayat, 14 P. R. 1886 Rev.

Sher Singh, vs. Subha, 10 P. R. 1892 Rev.

Suchet Singh vs. Basanta, 11 P. R. 1891 Rev.

Shah Muhammed vs. Diwan Buksh, 12 P. R. 1892 Rev.

Ranjas vs. Nihala, 13 P. R. 1892 Rev.

³ See a case under this Act. *Sukdeb Biswas vs. Balia Biswas*, 19 C. L. J. 255 (per Mukherjee, J.).

provided that, of such heirs, an heir who was joint with the thicadar shall have preference over an heir who was separated. This is indeed a very attenuated form of Primogeniture recognized in the protected thicadari tenure in the Central Provinces and may very well be classed as an anomalous form of Primogeniture.

The two important things that seem always to occupy the minds of a Jurist are the different kinds of formation of the law, and the forms in which it presents itself as externally observable.

Primogeniture as
creature of custom.

These are, properly speaking, those modes by which authority, that is, the sense of social and individual claims, obtains recognition. The elements making up authority itself are essentially the same as those of any overwhelmingly important claim that demands absolute satisfaction, and presents itself as a claim of the society. It is, in fact, merely a question of concrete embodiments whether it shows itself as framed into an injunction or rule presupposing obedience, or whether the recognition of such a claim manifests itself in accommodating conduct and in custom, unconsciously appropriate. The main difference, with regard to the embodiment of law, consists in its being either a rule declared before-hand, or manifesting itself in special cases, or in its appearing as custom. A rule of law is always a precept which, in order to bring about a certain state of things conceived as an object previously marked out, exacts, permits, or prohibits certain conduct either absolutely or conditionally in the event of certain circumstances occurring or in the absence of certain circumstances. Every single law, therefore presupposes a social organ corresponding with it, a differentiated, self conscious, higher power, which is, during periods rising above the level of primitive rudeness, recognized as the supreme power of the state and as its proper organ; and it further presupposes subjects possessing consciousness, who from ready conviction or through moral coercion, through fear of consequences, are impelled towards an appropriate

activity, or can be compelled by material force to obey the precept given, and to make good any injurious results arising from disobedience to it. Custom, on the contrary, does not, in itself, appear in the form of a rule, although theoretically a rule may be and is usually derived from it, and may be asserted by force whenever the self-conscious application of laws has become general in a given society. Custom as a source of law therefore presupposes the juristic sentiments of a people, and certain external, constant and general acts by which it is shown. As long as custom prevails purely as such, it manifests itself, for the most part, in the voluntary and unconscious, although, ready, adaptation of men to some mode of proceeding, a deviation from which under ordinary circumstances cannot be conceived by them as possible. They were originally prompted to adopt it by the consideration that it is easier to repeat a proceeding once taken, no matter what circumstances may have given rise to it, than to initiate a new one. Further, the more frequently any line of conduct is followed, the more inconvenient it becomes to devise new modes of proceeding, differing from the old one: every new beginning indeed is attended by greater trouble than the continuance of accustomed ways. Besides, the customary proceeding is, owing to natural selection, nothing else but the most fitting accommodation to the agencies operating during the process of habituation, and accordingly, on the average, the most expedient. Custom thus involves necessarily the two conceptions, the conviction of expediency and the external expression of this conviction in the constant and general use.

Miraglia¹ says that "the first and chief source of positive law is custom, which presupposes the juristic sentiment of

¹ Comparative Legal Philosophy, p. 300.

a people and certain external, constant, and general acts by which it is shown." One thing indeed seems quite certain that the formation of customary law, founded upon identical conduct, under similar external circumstances,—of individuals having the same instincts, dispositions, and modes of thought—has proceeded incessantly as an unconscious formation of law since the union of the earliest and most primitive social groups, and that, having obtained a new foundation in the primitive codes, it was afterwards, for some time, the only mode of development of the order of law. Customary law held for a while exclusive sway over the society, and the conscious establishment of law, in every new field which it embraces, is preceded first by the formation of usage, afterwards, of legal custom, and at length, of customary law. Customary law thus supplies an element of law lying outside the consciousness of the sovereign power as well as of the juridical profession and pervades the history of the development of law and permeates all its other departments. This is why the theory of customary law always exerted a paramount influence on the doctrines of the formation of law.

Several doctrines somewhat deviating from each other in detail, but becoming ultimately reconciled, arose concerning the mode of the formation of customary law, and the foundation of its authority. Cicero gives prominence to the facts, that it insensibly arises from nature, is fostered and enlarged by practice, and, through the approval of the mass, develops into morals by its antiquity. Paulus founds its authority upon the experience of its justness, while Julianus traces it back to the consent of the people.

I shall be failing in my duty if I do not stop here to say a word about our Hindu theory of custom. It is needless to remind you that our Hindu sages are unanimous in according a large

amount of respect to custom and usage.¹ I would only point out the possible theory that touches the question of the founda-

¹ See e.g.,

Katyayana.—citing *Bhrigu*—"Whatever be the usage of a country, tribe, or nation, body of people or village, let that be followed, and let partition of heritage be made in conformity thereto."

(*Cole. Dig.*, Vol. III, p. 376.)

Samvarta.—"Whatever custom has in a country come down from generation to generation the same is transcendent law, provided it be not repugnant to the Vedas."

(*Samvarta Samhita*.)

Manu.—"The King who knows the revealed law, must inquire into the Dharmas of classes, the Dharmas of districts, the Dharmas of traders, and the like, and the Dharmas of families and shall establish their peculiar Dharmas." (VIII. 41.)

जाति-जानपदान् धर्मान् श्रेणीधर्माश्च धर्मवित् ।
समीत्य कुलधर्माश्च स्वधर्मं प्रतिपादयेत् ॥
विद्वद्भिः सेवितः सन्निर्मित्यमरेष्वरागिभिः ।
तद्वदेनाभ्यनुयायी यो धर्मांस्तन्निबोधत ॥

"The Scripture, the Codes of Law, approved usage and self-satisfaction, the wise have openly declared to be the quadruple description of the juridical system." (II. 1.)

वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
एतच्चतुर्विधं प्राहुः साक्षाद्दर्शस्य लक्ष्यवत् ॥

"Know that system of duties which is revered by such as are learned in the Vedas, and impressed on the hearts of the just who are ever exempt from hatred and inordinate affection." (II. 12.)

सन्निराचरितं यत् स्याद्दार्ष्टिक्यैश्च विजातिभिः ।
तद्दे प्रकुलजातीनामपि वक्ष्ये प्रकल्पयेत् ॥

"What has been practised by good men and by virtuous Brahmanas if it be not inconsistent with the legal customs of provinces or districts, or classes and families, let him establish it." (VII. 46.)

विहितो धर्मः, तद्वसानि विद्वदाचारः प्रमाचम् ।

tion of its authority. Professor Berolzheimer¹ has pointed out that Vedic **स्वधा** contains a reference to whatever is sanctioned by law as custom or practice. This **स्वधा** again is conceived as the quality or disposition¹ of nature, the essence of a person or thing, as derived from its genesis and growth. It is conceived by the Vedic Rishis as the order or constitution of nature, as a generating and creative force, developing from the spontaneous energy inherent in material objects without the intervention of any external agency.² Herein seems to lie the authority of custom or usage. Whatever is 'पूर्वी,' whatever is 'दीर्घमुत्त,' demands our obedience perhaps because the very fact of its being done or observed so often by so many, makes it more probably consistent with nature. No doubt people may err; they may be misled by 'निकर्तति.' But such error would not long remain unpunished. What is contrary to 'स्वधा' could not have been repeated with impunity; and the fact of its long repetition without punishment would prove its acceptability to the guardians law.

Vasistha.—"An act is legal where it is sanctioned by scripture and law; in their absence the usage of the great is the authority."

Gautama.—"वेदो धर्मो मूलं तद्विदाश्च स्वतिथीषि ।

Yajnavalkya.—"श्रुतिः स्वतिः सदाचारः स्वस्य च प्रियमात्मनः ।

सम्यक् संवत्सजः कालो धर्मो मूलनिर्दं स्वतम् ॥ I. 7.

Narada.—"Where two texts of law differ from one another there the rule founded on usage is recognized. Usage alone is prevalent and the law is thereby ascertained."

Skanda Purana.—"In respect of any matter, if there is no direct ordinance or prohibition in the Vedas or in the Codes of law, the law is to be ascertained by reference to the usage of the country and family."

Mahabharata.—"The Vedas are different, so are the Smritis or Codes of law; he is not a Muni or Sage whose doctrine is not different from that of others; the principle of virtue remains hidden in cave: the career of great men is the only path."

See Dr. Sen's Hindu Jurisprudence (T. L. L.).

¹ World's Legal Philosophies, p. 38.

² See author's "Hindu Philosophy of Law," p. 86; also p. 20.

So one essential element of custom, according to Hindu theory, will be that it should endure during a long time and that it should manifest itself in repeated acts. Roman law during the Middle Ages took a similar view by connecting the theory of customary law with the doctrine of prescription, a doctrine, traces of which may be discovered in certain expressions to be found in the Code of Justinian, and which, later, was accepted by the canon law without qualification. Hence arose the requirement, that custom should have lasted during a definite and long time or during a time against which the memory of man runneth not to the contrary, which requirement is not always identical with the other requisite, that it should manifest itself in repeated acts. The latter requisite has not received general acceptance. One act alone, if attended by a permanent effect during the proper period of time, is deemed sufficient to establish custom.

There is one function of custom to which I shall draw your attention, and you shall see for yourselves how far this function of custom has played a part in our Hindu Law. Custom plays an important part in the assertion of positive law. A strict analysis of the authority of law will show that, although it is confessedly the positive and conscious emanation of the sovereign power of the state, yet, as long as all the members of the society do not stand upon the same level of wider discernment which is occupied by those who wield the supreme authority, it derives its force mainly from custom. The commands of the sovereign can undoubtedly be enforced by the material power at the disposal of the supreme authority; but their general enforcement, nevertheless, becomes only possible if the necessity of employing coercion is exceptional, and the subjects obey, on the whole, voluntarily, under a self-discipline representing moral suasion, which, as it does not rest upon conscious agreement, must necessarily be founded upon acquiescence through custom.

This is so when law emanates from the political god; it is

still more so when it is the command of the divine sovereign not couched in any exact language ; and hence we are told in Hindu Law that "if a custom or usage has obtained in a country, district, village, nation, tribe,¹ class or family, and has been invariably observed from time immemorial, or for many generations, it supersedes the general maxims or rules of the law."¹ "Usage being a branch of the Hindu law, which, wherever it obtains, supersedes the general maxim of the law."² The custom or usage which has not been invariably observed from time immemorial, or for many generations, is however not to be held as superseding the maxims of law.³ Dr. Sen in his Hindu Jurisprudence says :—"Sadácháras, or the established usages of good men furnish a supplementary criterion for ascertaining the nature of approved conduct. There is, however, a dispute as to whether such usage can at all prevail as evidence of commendable conduct, when it conflicts with an express text of Smriti. The leading commentators seem to be of opinion that in a case like this the express text must prevail, and the reason

¹ Vyavasthá Darpaṇa, Vol. I, p. 117 : *cf.* Narada—"Usage alone is prevalent, and the law is thereby ascertained."

Also Skanda Purāṇa—"Law is to be ascertained by reference to the usage of the country and family."

² Stra. H. L., Vol. I, p. 251.

³ Vyavasthá Darpaṇa, Vol. I, p. 118. As to what should be the length of time taken here in Hindu Law there seems to be no standard. In English law the reign of Edward I marks the furthest limit to which the memory of man can run. Prof. Sarkar gives an extract in his Vyavasthá Darpaṇa from the judgment of Sir Charles Grey to the effect that, in regard to Calcutta, the Act of Parliament in 1773, which established the Supreme Court, is the period to which we must go back to find the existence of a valid custom ; and that after that, there can be no subsequent custom, nor any change made in the general law of the Hindus, unless it be by some Régulations. In regard to Mofussil, he says, we ought to go back to 1793 ; prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain. (See Clarke's Report, pp. 113-114.)

they assign is this :—An established usage not supported by any available text of Smṛiti still raises the presumption that there must have been some text of Smṛiti at the basis of the usage which has now been lost or forgotten; this presumption is, however, rebutted when we find an express text of Smṛiti condemning the conduct. The basis of the presumed propriety being thus gone, it follows that the prevalent usage can no longer be supported as proper. In support of this proposition, I may refer to the discussion contained in one of the Adhikaraṇas of Mādhavāchāryya's Jaiminiya-nyāya-mālā-vistāra, which runs as follows :—“ In Southern India, there is a custom among the learned of marrying one's maternal uncle's daughter. This custom being in conflict with an express text of Smṛiti prohibiting such marriage, the question arises whether it can be accepted as good evidence (of conduct approved by sacred law) or not. It may be contended that it is good evidence like other established usages, but that is not correct because it is opposed to Smṛiti. The weight attached to the usage of the learned arises from the inference that it is based on Smṛiti (although an express text may not be traceable), but when there is an express text opposed to the usage, the inference must give way.

“ It should, however, be observed that this view does not imply that an established usage, where it conflicts with an express text of Smṛiti, should be condemned by the King. The condemnation proceeds from the broader standpoint of Dharma, which has a religious reference, but by reason of the existence of the established usage, conduct in consonance with it must be tolerated though not approved by the King. Thus Brihaspati expressly declares : ‘ Local, tribal, and family customs wherever they prevail from before must be respected; otherwise, the subjects become agitated, popular disaffection springs up and the strength and treasury (of the Government) suffer in consequence; (then giving certain instances of customs condemned by the Smṛitis, Brihaspati proceeds to observe), by such a

conduct those (who pursue it) do not render themselves liable to expiation or punishment.' "

Dr. Sen then proceeds to review other Hindu authorities on the point and arrives at the conclusion that "such customs or usages wherever they exist must be tolerated and recognised in the administration of justice, but must not be recognised as affording any index of dharma or commendable conduct and encouraged as such."

The authority of custom as expounded by our jurists has received sanction in the hands of modern
 Elements of custom. Judges, and the Judicial Committee in *Collector of Madura vs. Mutu Ramalinga Sathupathy*¹ accepted it in laying down the duty of a European Judge in the matter. "The duty of a European Judge, who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage." The reason for this was given by the Judicial Committee saying, "For, under the Hindu system of law, clear proof of usage will outweigh the written text of law." Such clear proof of usage was allowed to outweigh the written text of law in *Samran Singh vs. Khedun Singh*² where it was held that in cases of inheritance according to the Hindu law, a deviation from the strict letter of the law may be legalized by a usage authorizing such deviation, only such usage should have been prevalent during a long succession of ancestors in the family so as to be known as 'Kuláchár' and have the prescriptive force of law. That custom, when it is ancient, invariable, and established by clear and positive proof, overrides the usual law of inheritance was also held in

¹ I.B.L.R. (P.C.), p. 12.

² Sel. S.D.A. Rep., Vol. II, p. 116.

Mussammat Kastura Kumari *vs.* Monahar De ¹ and in Raja Nagendra Narayan *vs.* Raghunath Narayan. ² In Mahamaya Devi *vs.* Gouri Kanta Chowdhury, ³ a Hindu widow's claim to a moiety of her husband's estate was disallowed on proof of a custom by which the estate always devolved entire to one heir.

Custom loses its importance as the statutes multiply. Custom represents mere juristic intuition, and it certainly cannot have its old extent and efficacy at a time when natural reason is more fully developed. "When reflection about universal principles dominates, and the organization of public power is developed, custom can no longer have the force of annulling the laws." ⁴

But we have already noticed that the custom of primogeniture obtained recognition of the legislature itself and such a custom had grown in ancient Zemindaries. Partibility, we have seen, is the general rule of Hindu inheritance; the succession of the single heir, in any case, is the exception. Even in case of descent of Rajas and their estates, there is no rule of Hindu Law requiring single succession. In every case in which a departure from this ordinary law of partibility is observable it must have originated in custom or Kulachar. ⁵ Impartible estate has always been assumed by our courts of law to be the creature of custom and in every case when impartibility has been pleaded

¹ S.W.R. for 1864, p. 39.

² Suth. W.R. for 1864, p. 20.

³ See also Rama Lakshmi Ammal *vs.* Sivanatha Perumal Sethu-
veyer.

Suth. W.R., Vol. XVII., Cr., p. 553.

⁴ S.D.A.R., Vol. I, p. 236.

⁵ See Raj-Kumar Sheo-raj-nandan Singh *vs.* Raj-Kumar Deo-
nandan Singh. Suth. W.R., Vol. XVI, p. 143.

Also The East India Company *vs.* Kamakchi Bau Sahibah. Suth.
W.R., Vol. IV (P.C.), p. 42.

strict proof of custom to that effect has been insisted upon.¹ But whenever such a custom has been established it has always been allowed to outweigh the ordinary law of succession and inheritance. In *Ramganga Dêo vs. Durga-Mani Juba-Raj*² the question of succession to the Tipperah Zemindari was agitated. The suit was instituted by the Juba-Raj against the son of the late Raja of Tipperah, for succession to the Tipperah Zemindari, and Court held that by the usage of the family, the person appointed Juba-Raj by the Raja for the time being shall succeed. A family custom by which the eldest son succeeds the reigning Raja of Pachete, his other sons as well as the minor branches of the family receiving only an allowance for their subsistence, was upheld in *Maharaja Garut-narayan Deo of Pachete vs. Anand Lal Singh*³ and in the case of *Raja Raghunath Singh vs. Raja Harihar Singh*⁴ it was decided that according to the family custom relating to an estate in Manbhum the succession vested in the eldest son of the deceased Raja born of any of his wives, in preference to the eldest of his Pat Rani.⁵

¹ A custom of impartibility must be strictly proved in order to control the operation of the ordinary Hindu Law of Succession. *Thakur Daryao Singh vs. Thakur Duri Singh*, B.L.R., XIII (P.C.), p. 165.

Rama Lakshmi Ammal vs. Sivanath Perumal, B.L.R., XII (P.C), 390-405. See also the *Shoosong Case* in (1856) S.D.A. Decis., p. 399.

² (1809) S.D.A. Rep., Vol. I, p. 270.

³ Sel. S.D.A. Rep., Vol. VI, p. 282.

⁴ Sel. S.D.A. Rep., Vol. VII, p. 126.

⁵ See also *Lala Indranath Sahi Deo vs. Thakur Kashinath Sahi*, (1845) S.D.A. Decisions, p. 17, in which the Kunwar or second son of a Raja, on the death of his eldest son, A (the Thakur), made over the Pargana of Sonapore to A's sons, B, the Kunwar's younger son, sued to participate. Held, that the Kunwar's eldest son, the Thakur, was entitled, agreeably to the family usage, to succeed to the Gadi and the entire estate, and B's claim was dismissed.

In all the cases we have hitherto referred to, the question of family custom or Kulachar was before the Court of law. Custom of Primogeniture however may be general, local or one confined only to the estate in question as was held in *Basant Rao vs. Mantappa*.¹ The custom may be either a custom of a district or of a family² and there is the possibility of distinction as to such a custom between a Raj, a Zemindary estate and a private family.

We have seen above that impartibility of an estate and primogenitary rule of succession are creatures of custom, and that custom outweighs the ordinary law of succession. But though a custom proved supersedes the general law, the supersession extends only to the extent to which the custom is proved to cover. The general law still regulates all beyond the custom. The question as to how far general law is superseded by a custom went up to the Privy Council in *Chintamani Singh vs. Nawlukho Kunwari*³ in which the case of the plaintiff was that the property in dispute being the ancestral property belonging to an undivided Mitakshara family of which the plaintiff and the husband of the defendant were the only members, was by virtue of a custom prevailing in the family impartible, and devolved at the death of the defendant's husband on the plaintiff, being the eldest male collateral and as such entitled to succeed to the exclusion of the widow and daughters of the last holder.

Similarly see *Maharaja Kunwar Basudev Singh vs. Maharaja Rudra Singh*, (1826) Sel. S.D.A. Rep., Vol. VII, 228.

Arjun Manik-Thakur vs. Ram Ganga Deo. Sel. S.D.A. Rep., Vol. II, p. 139.

Rani Sumitra vs. Ram Ganga Manik. Sel S.D.A., Rep., Vol. III, p. 40.

¹ I.B.H.C.R. (app.), p. 42 (47). See also *Rawut Arjan Singh vs. Ghanasiam Singh*.

² *Umithanath Chowdhury vs. Gourenath Chowdhury*: 13 M.I.A. 542.

³ 1 Cal. 153 (P.C.).

The defendant¹ denied the existence of any Kulachar, custom or usage which could negative her right and asserted that the only custom in the family was that the Talook was impartible and descendible to an eldest son. Contention was that the estate being impartible should be deemed to be her husband's separate estate, and rules regarding succession to such separate estate should apply. Their Lordships of the Judicial Committee held that impartibility did not imply that it was the separate property of the last holder and that where the family, to which ancestral property held in the peculiar manner, belongs, is subject to the Mitakshara, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughter of the deceased holder by the ordinary Mitakshara rule of collateral succession. Similarly in *Nilkristo Deb Barmana vs. Birchandra Thakur*¹ it was decided that the general rule of Hindu Law, which gives a preference as heir to the whole-blood over the half-blood extends also to a Raj, in the absence of evidence showing that the family custom by which the succession to the rajdom is governed supersedes the general law in this respect also. The case of *Jogendra Bhupati vs. Nityananda*,² where the Judicial Committee held that the fact of the Raj being impartible does not affect the rule of succession and that the question as to who is to succeed on the death of the Raja, is to be answered with reference to the rule as to succession to partible estates though the estate can be held by only one member of the family at a time. The same view was also upheld

¹ B.L.R., III (P.C.), p. 13.

See also *Shidojirao vs. Naikojirao*: 10 B. H.C.R. 228, and *Maharani Hiranath vs. Babooram Narayan*: 9 B.L.R. 274. Also *Bhuiya Sarat Kumar Das Mahapatra vs. Akshoy Narayan Das Mahapatra*, 13 C.L.J., 305.

² 17 I.A. 128. See also the *Shivagunga* case.

in *Subramahya Panday vs. Siva Sibramanya Pillai*¹ in which it was decided that in determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next it should be seen whether family custom or Kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate by analogy to general Hindu Law.

In communities where polygamy prevails the question would necessarily arise as to whether seniority or superiority in caste or in form of marriage of a wife would in any way affect the seniority of a son. We have seen how our early Hindu law-givers devoted much time and space in discussing the relative position of such sons and how they differed from each other in this respect. We have also noticed how even in the Vedic age a distinction was sought to be drawn between *ज्येष्ठ* and *ज्येष्ठिनीय* sons, the latter being the first son born of the first wife of a man. It is difficult to say that Hindu law gives us any definite rule on the point and even here the custom or usage shall determine the position. The question once came before our Court of law in *Ramasami Kamaya vs. Sunderalingasami*² and the solution was sought in the family custom, it being found that a valid custom prevails among the Kumaba Zemindars whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, and the question of seniority of wife is to be answered with reference to the date of marriage and not to the age of the wife. This was exactly the view expressed by the Judicial Committee in *Ram Lakshmi Ammal vs. Shivanath Perumal* :³ Only like all other customs it must be strictly proved.

¹ 17 Mad. 316.

² 17 Mad. 422.

³ 14 M.I.A. 570.

A special family custom of inheritance inconsistent with the ordinary law may survive the primitive condition of things out of which it originally sprang. The principle embodied in the expression '*Ces sat ratio cessat lex*' scarcely applies to custom. Nay, even in case of law other than customary we are very often confronted with rules that are retained though the reason that was responsible for their birth long ceased to hold good. In a recent case¹ decided by the Judicial Committee, Lord Atkinson had to deal with a special family custom of primogeniture and he gave the highest judicial recognition to this principle of survival.

We have already noticed what according to the jurists are the essentials of custom and have given a brief historical account of it. It will not be out of place here to refer to a few judicial opinions on the point, the net result of which may be summarised by saying that a custom must be ancient,² immemorial, uniform,³ unaltered, uninterrupted, invariable, constant and continuous,⁴ certain,⁵ definite and notorious, peaceable,⁶

¹ Rao Kishore Singh *vs.* Musammat Gahnebai : 24 C. W. N. 601 (P. C.)

² Basanta Rao *vs.* Mantappa : I. B. H. C. R. app. 41.

Bahu Nanaji *vs.* Sundra Bai : II. B. H. C. R. 249 (271).

Kuar Sen *vs.* Mamman : 17 All. 87.

Maharaj Mahtab *vs.* Government : 4 M. I. A. 466.

Ammal *vs.* Sivanatha Perumal : 14 M. I. A. 570.

³ Saperandhwaj *vs.* Garuradhwaj : 15 All. 147 (167).

Basava *vs.* Lingangaudu : 19 Bom. 428.

⁴ Rajkishen *vs.* Ramjoy : 1 Cal. 186 (P. C.).

⁵ Jamebah *vs.* Pagul Ram : 1 W. R. 251.

Ramalakshmi *vs.* Sivanatha : 14 M. I. A. 570.

Sarabjit *vs.* Indrajit : 27 All. 203.

⁶ Rowther *vs.* Rowther : 30 M. L. T. 85 (P. C.).

Ram Kanta *vs.* Shamananda : 36 Cal. 504 (P. C.).

(Reversing Shamananda *vs.* Ram Kanta : 32 Cal. 6.)

⁶ Ram Kanta *vs.* Shamananda : 36 Cal. 590.

consistent and compulsory¹; and it must not be unreasonable, illegal, immoral or opposed to public policy. In the recent case of *Ambalika Dassi vs. Arpana Dassi*² the essentials of a valid custom were summed up by Mr. Justice Chatterjee who held that in order to establish a custom, it must be shown that the custom has existed from time immemorial, and that where the custom set up is peculiar only to a single family, the rule is more strictly enforced than ever. A family custom of proved antiquity is recognised by the courts, irrespective of the position and rank of the family. It was noticed in this case that there is no definite rule in Hindu Law as to how old a custom must be that it may have the force of law. In an earlier case³ Mr. Justice Mookerjee held that a custom to be valid must have four essential attributes: first, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin; fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. A special Bench of the High Court of Calcutta in *Marian Bibi vs. Sheikh Muhammad Ibrahim*⁴ reiterated the same view and long before all these pronouncements the Judicial Committee⁵ repeatedly declared these to be the essentials of

¹ *Mills vs. Mayor of Calcutta*: L. R. 2 C. P. 479.

Patel Vandravan vs. Patel Manilal: 16 Bom. 470.

² 29 C. L. J. 264.

³ *Mahamaya Devi vs. Haridas Halder*: 42 Cal. 455; 20 C. L. J. 183. In this case Mookerjee J. reviewed several English cases and held that a custom cannot be extended by parity of reason and that a custom originating within the time of memory, even though existing in fact, is void at law. The living memory under the Hindu Law was discussed. See also *Pradyote vs. Gopi*: 37 Cal. 322.

⁴ 28 C. L. J. 306.

⁵ *Huoprosad vs. Sheodayal*: 3 I. A. 259.

Ammal vs. Shivanatha Perumal Sethuveyer: 14 M.I.A. 570.

Umirthanath Showdhery vs. Gourinath: 13 M.I.A. 542.

Mir Abdul Hussain vs. Bibi Sona: 27 C. L. J. 240 (P.C.).

a valid custom. It is needless to say that the burden of proving all these lies on him who relies on the existence of the custom.¹ It will be beyond our purpose to examine what evidence will discharge the onus.² It may, however, be questioned whether the evidence of a more general custom would be relevant to prove a special one, how far evidence relating to tribal custom is relevant to prove a family custom, and what are the materials on which a custom should be found. The Judicial Committee have discussed this question, and I would refer you to *Mir Abdul Hussain Khan vs. Musst. Bibi Sona*³ for the purpose.

We have said above that custom outweighs the written texts of law. It will be pertinent to enquire whether this applies also to statutes, whether in the absence of any saving clause in the statute custom can outweigh its provisions. *Dr. Gour*⁴ denies that custom has any such force and he is supported in this view by judicial decisions.⁵ It is needless to recall certain Regulations⁶ that recognised custom, local or special.

¹ See *Gurudhwaja Pershad vs. Supernadhawaja* : 23 All. (P. C.).

² See *Lala Gajendra vs. Lala Mathura* : 20 C. W. N. 876 (P. C.), where evidentiary value of a custom prevailing in a branch family was discussed.

See also *Gurudhwaja Prasad vs. Supernadhawaja* : 23 All. 37 (P.C.).

Mir Abdul Hussain vs. Musst. Bibi Sona : 27 C. L. J. 240 (P.C.).

Gonesh Dutt vs. Maheswar.

Rana Mahtab vs. Badan Singh.

Maharaja of Joypur vs. Vikramadeo Guru : 31 C. L. J. 91 (P.C.).

Raja Ram Rao vs. Raja of Pittapur.

Proof of judicial recognition is sufficient to dispense with proof in individual cases.

³ 27 C. L. J. 240 (P.C.).

⁴ Hindu Code, p. 229.

⁵ *Mahanlal vs. Amratlal* : 3 Bom. 174.

Tuni Orain vs. Leda Orain : 1 Pat. L. J. 225 ; 20 C.W.N. 1082.

⁶ See Reg. X. of 1800, 18 Jungle Mehals.

How far an individual can successfully control a custom? Can there be abandonment of it? Before answering these questions it may be pertinent to ask if custom can be created by the contract of individuals. No doubt individuals may bind themselves by many arrangements that may be agreed upon by them, but it would scarcely be correct to say that a custom can be created by contract. Similarly an individual may, by his agreement, give up the benefit of a custom but it is hardly possible for him to abandon custom. Established custom, like law, would not depend upon individual will or whim.

Yet the existence of a family usage by which an estate descends to the eldest son of the proprietor will not preclude an eldest son from being personally bound to his brothers by admissions formally made to them, acknowledging their rights to co-heirship along with himself.¹

* * * *

In spite of the many prerogatives of the Crown its power to grant or transfer lands has not gone unquestioned. In Bengal the question was much agitated soon after the Permanent Settlement, and scholars of the time variously attacked the declaration which the Crown made and which had the effect of making the Zemindars the proprietors of the soil. Briggs, in his "Land Tax" adduced abundant evidence "to prove that neither the Hindu nor the Mahomedan sovereigns ever claimed to be proprietors of any part of the soil, but of the waste or of the lands escheated in default of legal successors"; and according to Briggs, these Mahomedan sovereigns "never pretend to deny the proprietary right of occupants."

¹ Raja Bishwanath Singh vs. Ram Charan Majumdar: S. D. A. Decis (1850), p. 20.

The reply which Gholam Hussain Khan, one of the most able and intelligent Mahomedans in Bengal, gave to a question by Lord Teignmouth on this point is full of value. The question was : " Why did the king purchase lands, since he was lord of the country, and might have taken by virtue of that capacity ? " Gholam Hussain's answer was : " The Emperor is not so far lord of the soil as to be able to sell or otherwise dispose of it at his mere will and pleasure. These are rights belonging only to such a proprietor of land as is mentioned in the first and second answers (*i.e.*, proprietor by purchase with the mutual consent of the parties ; by gift from the proprietors or by inheritance). The Emperor is proprietor of the revenue, but he is not proprietor of the soil. Hence it is, when he grants aymys, altumgahs, and jageers, he only transfers the revenue for himself to the grantee." Baillie is of the same opinion when he says, " The Ooshr and Khiraj are taxes on the vegetative powers of the soil. The soil itself, with everything belonging to it, is the absolute property of the owner.....From the manner in which Ooshr and Khiraj was originally imposed on the land, it is evident that a Mahomedan sovereign has no possible pretension to be considered the proprietor of Ooshree or Khirajee land." And Phillips asserted that " The sovereign never claimed any right to the soil itself as part of his share, nor ever exercised a right to anything beyond the natural or accidental produce of the soil." He quoted from Manu where the great law-giver says :

‘ दृष्टेरपीमां दृष्टिवीं भार्यां पुष्पविदोविदुः ।

स्वाण्यदेस्य केदारमाहु शस्वतो वृगम् । ’

and pointed out that " this general principle had been recognized in Germany, Java and Russia and indeed, in most countries, and is expressly enunciated in Mahomedan law also."

Whatever right the Crown may have in the soil the question which is of consequence to us is whether the Crown can make a grant of that right and whether it can make the right granted heritable, and heritable in a particular manner. In other words, whether rules restricting individual power in this respect would apply to the Crown. We are told in *Tagore vs. Tagore* that no individual can create a new rule of descent for any estate: it is not open to an individual to be his own law-giver. Would this rule apply to grants made by the Crown so as to affect any condition contained in the grant imposing a special rule of succession in the granted estate? In those systems where law does not emanate from the sovereign political authority the king's prerogative would not place him beyond the authority of law. Law that governs the subject would equally govern the king. "Law is the *Kṣatra* of the *Kṣatras*. Therefore, there is nothing higher than Law."¹ Our Hindu legal philosophers would not believe the doctrine that "there is no law without a sovereign, above the sovereign or besides the sovereign. They do not even believe that law exists only through the sovereign."² It will be interesting to notice here that, according to some at least of our ancient legal philosophers, law is more powerful than even the gods,³ and it is this doctrine which really distinguishes our system from the Western ones. Even the very divinity that gives us law has scarcely had any freedom in the matter, law being the result of divine essence, divine reason, and not of divine will. Our law is not the whimsical, wilful command of any god or man however powerful he be. When, however, law is viewed as the command of a sovereign authority, that authority itself may not be bound by its provisions unless he chose to

¹ Br. Ar. Up. 1. IV. 14.

See also author's *Hindu Philosophy of Law*, p. 112.

² See author's *Hindu Philosophy of Law*, p. 113.

³ See *ibid*, p. 17.

command himself also in the matter. The Crown, in such a system, would not be affected by a statute, unless specially named in it. This is an accepted principle in English law, and courts of law in India have greatly followed it. The question came before the High Court of Bombay in *Ganpat Putaya vs. the Collector of Kanara*¹ in connection with a pauper suit, and West J., in delivering the judgment of the Court, declared that the direction contained in section 309 of the then Civil Procedure Code did not preclude the Crown or its representative from urging its prerogative and insisting upon its right to precedence. He further found that it was a universal rule that the prerogative and the advantage it affords cannot be taken away except by the consent of the Crown embodied in a statute. This rule of interpretation he recognised as well-established, and as applying not only to the statutes passed by the British, but also by the acts of the Indian legislature framed with constant reference to the rules recognised in England. This rule of construction, according to which the Crown is not affected by a statute unless specially named in it, was similarly held applicable to India in the *Secretary of State for India vs. Mathurabhai and others*² by Sir Charles Sargent, Chief Justice of Bombay, and Mr. Justice Candy.

The question was much discussed by counsels on either side in *Bell vs. the Municipal Commissioners of the City of Madras*,³ and it was contended for the Crown on the authority of the *Magdalen College case*⁴ that where the king had any prerogative, title or interest, it could not be taken away by general terms. It was further contended that although an Act

¹ 1 Bom. 7.

² 14 Bom. 213.

³ 25 Mad. 457.

⁴ 11 Coke's Rep., 746.

contained an exemption in favour of the Crown in certain respects, the absence of any such provisions in another respect would not mean that those provisions would be binding on the Crown. The exemption which the Act may contain would be taken to have been inserted *ex abundanti cautela*.¹ The Crown is only bound by express words.² It was contended on the other side that the rule of construction did not apply to an Indian Act and *Arzan vs. Rakhal Chandra Roy Chowdhury*³ was cited as an authority for the position. After a review of the provisions of the Indian Councils Act, 1861,⁴ it was held that though in England, owing to historical causes, the legislature had proceeded on the view that the Crown was not bound by a statute unless named in it; so far as India was concerned it would be more correct to say that, as a general rule, the Indian legislatures had proceeded on the assumption that the Government would be bound by the statute unless expressly or by necessary implication excluded from its operation.⁵

We need not stop here to examine which view is correct, for, so far as the subject under our review is concerned, the position is covered by the Crown Grants Act⁶ and according to this Act "all provisions, restrictions, conditions, and limitations ever contained in any such grant or transfer shall be valid and take effect according to their tenor, any rule of law,

¹ *Smithett vs. Blythe* : 1. Br. Ad. 509.

Westorer vs. Perkins : 2 E. & E. 57; 28 L. J. (M.C.) 227.

Mayor etc. of Weymouth vs. Nugent : 34 L. J. (M.C.) 81 ; 6 B. & S.

22.

² *Bacon's Abridgment Prerogative* E. 5.

Attorney Genl. vs. Donaldson : 11. L. J. (Ex) 338.

³ 10 Cal. 214.

⁴ 24 & 25 Vict., Cap. 67.

⁵ Read also 31 Rom. 86 ; 29 AM. 537 ; 15 C.W.N. 972 ; 10 C.W.N. 857 ; 7 Bom. 552 N.

⁶ Act XV of 1895.

statute or enactment of the legislature to the contrary notwithstanding." ¹ The provisions of this Act were thus held to control a grant made in 1861, and the Privy Council held that by force of section 3 of that Act the Government must be deemed to possess power to divert the regular line of succession by an executive act making succession to follow the rule of primogeniture.² I have already invited your attention to the Oudh Estates Act. The occasion for the Act is stated in the preamble which runs as follows : "Whereas after the re-occupation of Oudh by the British Government in the year 1858 the proprietary right in diverse estates in that province was, under certain conditions, conferred by the British Government upon certain taluqdars and others ; and whereas doubts may arise as to the nature of the said taluqdars and others in such estates, and as to the course of succession thereto ; and whereas it is expedient to prevent such doubts, and to regulate such course, and to provide for such other matters connected therewith as are hereinafter mentioned ; it is hereby enacted, etc."³ Section 3 of this Act declares that "Every taluqdar with whom a summary settlement of the Government revenue was made between the 1st day of April, 1858, and the 10th day of October, 1859, or to whom, before the passing of this Act and subsequently to the 1st day of April, 1858, a taluqdari Sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable, and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or Kabuliyat executed by such taluqdar when such settlement was made, subject to all the conditions affecting the taluqdar contained in the orders passed by the Governor-General of

¹ *Ibid*, sec 2.

The Act is made retrospective ; so all transfers or grants made before or after the passing of it shall be saved by its' operation.

² Sheo Singh vs. Raghubans Kunwar : 27 All. 634 (P.C.).

³ Preamble to Act of 1869 (Oudh Estates Act).

India on the 10th and 19th days of October, 1859, and republished in the First Schedule hereto annexed, and subject also to all the conditions contained in the Sanad under which the estate is held." In section 8 we are told of certain lists of taluqdars and grantees and it enacts as follows : "Within six months after the passing of this Act, the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India in Council, shall cause to be prepared six lists, namely :—*First*, a list of all persons who are to be considered taluqdars within the meaning of this Act ; *Second*, a list of the taluqdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir ; *Third*, a list of the taluqdars, not included in the second of such lists, to whom Sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such Sanads or grants shall thereafter be regulated by the rule of Primogeniture ; *Fourth*, a list of the taluqdars to whom the provisions of sec. 23 are applicable ; ¹ *Fifth*, a list of the grantees to whom Sanads or grants have been or may be given or made by the British Government, up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such Sanads or grants shall thereafter be regulated by the rule of primogeniture ; *Sixth*, a list of grantees to whom the provisions of sec. 23 are applicable." ¹

The taluqa of Mahewa is an estate in Oudh relating to which a succession dispute went up to the Privy Council. The taluqa was, before the annexation of Oudh, owned by one

¹ Sec. 23 says : "Except in cases provided for by sec. 22, the succession to all property left by taluqdars and grantees, and their heirs and legatees, dying intestate, shall be regulated by the ordinary law to which members of the intestate's tribe and religion are subject."

Gajraj Singh, and after the confiscation of Oudh, the second summary settlement was made with him, and his name was entered in lists 1 and 2 of the lists required to be prepared under section 8 of the Oudh Estates Act referred to above. In accordance with a Government Circular, dated 11th October, 1859, enquiries were made of him (as of other taluqdars) in regard to the succession to his estate, and his replies indicated that it would descend to his male heirs successively. A Sanad was accordingly granted to him. Gajraj Singh died on the 16th January, 1860, leaving him surviving two brothers, Girwar Singh and Dunia Singh, of whom Girwar Singh was the elder, two nephews, sons of Dunia Singh, namely, Sheo Singh and Balbhaddar Singh, and a widow, Anand Kunwar. On his death Girwar Singh succeeded to the taluqa and was recognized by the Government as taluqdar. In 1861 the Government proposed, in the case of any taluqdar whose eldest son by custom succeeded him, to change the ordinary form of Sanad for a Sanad stating that primogeniture would be the line of inheritance. Girwar Singh, on being asked if he wished this change, replied that he wished for a primogeniture sanad, and one was said to have been granted to him. On 4th March, 1862, Girwar Singh made a will devising the estate to Balbhaddar Singh, whom he is alleged to have formally adopted in 1864. On the 2nd January, 1865, Girwar Singh died and was succeeded by Balbhaddar Singh, who himself died on 12th December, 1898, without issue, but leaving his widow, Raghubans Kunwar, and his brother, Sheo Singh, both of whom claimed to be the next heir to the estate. On the 11th February, 1899, mutation of names was ordered by the revenue authorities to be made in favour of Sheo Singh, and he was put in possession of the estate. On 6th February, 1900, Raghubans Kunwar instituted a suit.¹

¹ I.L.R. 27 All., p. 634 (P.C.): Sheo Singh *vs.* Raghubans Kunwar.

The Subordinate Judge who tried this suit found that Girwar Singh had validly adopted Balbhaddar Singh and that Act I of 1869 had no application to the case. In his judgment the succession was governed by the ordinary Hindu Law under which the plaintiff was the next heir. He also found that no custom excluding females had been proved. Further, assuming Act I of 1869 to apply, he was of opinion that on the true construction of sec. 22, clause (b), of the Act, Balbhaddar Singh had, in consequence of his adoption, ceased to be the brother of Sheo Singh, and so plaintiff was a nearer heir even under the provisions of the Act. The defendant's contention as to Girwar Singh's getting a Primogeniture Sanad was overruled, no such Sanad being produced by them and the secondary evidence being insufficient to prove it. Sheo Singh appealed, and the Judicial Commissioners who heard the appeal concurred with the findings of the Subordinate Judge on the questions of adoption and custom excluding females from inheritance. But they differed from the Subordinate Judge as to what law shall govern succession, and held that the succession must be regulated by sec. 22 of the Oudh Estates Act, but accepted the construction put on it by the Subordinate Judge. Sheo Singh appealed to His Majesty in Privy Council. Their Lordships of the Judicial Committee held that sec. 22 of the Act did not apply¹ and the real contention before their Lordships on behalf of the appellant was that, assuming the Act not to be applicable to the case, the succession to the taluqa was governed, not by the terms of the Sanad under which it was held, that the Sanad was one granted to Thakur Girwar in substitution for the earlier Sanad in favour of Gajraj, and that by the terms of Girwar's Sanad the taluqa descended, on the death of the holder, to the nearest male heir according to the rule of primogeniture.

It will be interesting to notice here the short history of the

development of the policy of Government given by their Lordships in the judgment. Referring to the policy their Lordships said: "This is a matter of history, and the whole story is to be found in Syke's compendium. It is sufficient here to notice two stages in that development. Down to the end of 1859, the Sanad granted for taluqas of the class to which the present belongs, that is to say, taluqas which by family custom descended to a *single* heir, but not necessarily to a male heir under the rule of primogeniture, were in a form sanctioned by the Government of India and printed at page 385 of Syke's compendium. It is a grant to the taluqdar and his heirs, *without specifying any particular rule of inheritance*. These Sanads appear to have been issued through the then Chief Commissioner, Mr. Wingfield, whose name they bear. The Sanad to Gajraj must from its date have been of this kind." "In 1860, a further development took place. It was considered desirable to encourage the settlement of taluqas so that they should descend to male heirs only, under the rule of primogeniture. And a new form of Sanad was approved by Government, embodying this rule of descent, which is printed at page 386 of the same book. Such Sanads appear to have been issued by Mr. Yule, then officiating as Chief Commissioner. It was further thought desirable to communicate the new form of Sanads in the older form, to point out its advantages, and to offer to such persons the option of taking the new type of Sanad in place of the *old*. This appears to have been carried out through the usual channel of communication, the local officers of Government. And from an official paper quoted at pages 100 and 101 of Syke's compendium, it would appear that a large number of such exchanges were carried out."

Their Lordships then found from evidence admitted in the court of first instance and that admitted at the appellate stage that Girwar Singh got the primogeniture Sanad. The Sanad said expressly: "It is another condition of this grant that in the event of your dying intestate, or of any of your successors

dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture." The lower courts held that even though such a Sanad was proved it would not in point of law operate to substitute the line of descent prescribed by it for the line prescribed by the earlier Sanad. The Judicial Committee did not accept this view of the lower court. They held that Girwar Singh certainly had power to surrender the estate conveyed by the old Sanad and the Government had power to grant that conveyed by the new one. The power of the Crown to create an estate descending by any rule of inheritance other than that laid down by the law was also questioned. But their Lordships disposed of it saying, "Whatever force such a contention might otherwise have had appear to their Lordships to be removed by the Act to which their attention was called, Act No. XV of 1895 (The Crown Grants' Act, 1895)."

After the decision of this case the Oudh Estates Act has been amended so far as it relates to questions of succession, and an explanation has been added to section 3 to the effect that "Notwithstanding anything contained in the Crown Grants Act, 1895, the conditions of the Sanad relating to succession, in so far as they are inconsistent with the provisions of the Act, shall not apply to the estate."¹ This amendment has materially altered section 22 of the Act which deals with the special rule of succession to intestate taluqdars and grantees.²

¹ Added by sec. 3 of the Oudh Estates Amendment Act, 1910.

² The amended section 22 runs as follows :—

If any taluqdar or grantee whose name shall be inserted in the second, third or fifth of the lists mentioned in section 8, or legatee, or if any taluqdar, grantee, heir or legatee whose name shall be inserted in the list referred to in section 31A, sub-section (3), or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, namely :—

What the legislature has declared through the Oudh Estates Amendment Act was practically held by Sir Barnes

(1) to the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the same manner as the estate was held by the deceased ;

(2) or if such eldest son of such taluqdar or grantee, heir or legatee, shall have died in his life-time, leaving male lineal descendants, then to the eldest son, successively, according to their respective seniorities, and their respective male lineal descendants subject as aforesaid ;

(3) or if such eldest son of such taluqdar or grantee, heir or legatee, shall have died in his father's life-time without leaving male lineal descendants, then to the second and every other sons of the said taluqdar, or grantee, heir or legatee, successively according to their respective seniorities, and their respective male lineal descendants subject as aforesaid ;

(4) or in default of such son or his male descendants, then to such person as the said taluqdar or grantee, heir or legatee, shall have adopted and his male lineal descendants subject as aforesaid ;

(5) or in default of such adopted son, or his male lineal descendants, then to the eldest and every other brother of such taluqdar or grantee, heir or legatee successively, according to their respective seniorities, and their respective male lineal descendants, brothers of the whole blood and their descendants being preferred to brothers of the half blood and their descendants, subject as aforesaid ;

(6) or in default of any such brother, or his male lineal descendants then to the widow of the deceased taluqdar or grantee, heir or legatee, for her life-time only ; or, if there be more widows than one, to the widow first married to such taluqdar or grantee, heir or legatee, for her life-time only ;

(7) and on the death of such widow, then to such son as the said widow shall, with the consent in writing of her deceased husband, have adopted, and his male lineal descendants, subject as aforesaid ;

provided that, after the expiration of six months from the commencement of this Act such consent shall be expressed by means of a registered instrument or by means of a will or codicil, executed and attested in the manner required by this Act ;

Peacock in Brij Inder Bahadur Singh vs. Ranees Janki

(8) or on the death of such first married widow and in default of a son adopted by her with such consent as aforesaid, and his male lineal descendants, then to the other widow, if any, of such taluqdar or grantee, heir or legatee, next in order of marriage, for her life, and on the death of such other widow, to a son adopted by her with such consent as aforesaid, and his male lineal descendants; or in default of such adopted son, then to the other surviving widows in the order of their respective marriages, for their respective lives, and on their respective deaths, to the sons so adopted by them respectively, and to the male lineal descendants of such sons respectively, subject as aforesaid;

(9) or in default of any such widow or any such adopted son or any such male lineal descendants, then to the mother of the deceased taluqdar or grantee, heir or legatee, for her life-time only;

Explanation.—In this clause the word “mother” does not include stepmother; and in the case where the deceased was an adopted son, it means that wife or widow of the father who joined in or made the adoption, or if the adoption was made by the father alone and there are at the time of the death of the deceased more widows than one, it means the one who was first married and, on her death, the other surviving widows in the order of their respective marriages in succession;

(10) or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid;

(11) or in default of any such agnate, then to such person as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee, heir or legatee, are subject;

provided that, when there are more persons than one so entitled, the estate shall descend to a single person according to the following rules, that is to say:—

(i) where among such persons some are connected by blood relationship and some by reason of marriage, the blood relations shall exclude the relations by marriage;

(ii) where among such persons some are related by the whole blood and some by the half-blood, those related by the whole blood shall exclude those related by the half blood;

Koer,¹ which also was a case relating to succession in another estate in Oudh. Sir Barnes Peacock held that the limitation in the Sanad was wholly superseded by Act I of 1869 and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act. In *Devi-baks vs. Chandravan*² a meaning was given to the word primogeniture used in Sanads saying that it bore the same meaning as in England and from the whole tenor of judgment it would appear that the provisions of the Act were made to govern the Sanad.

I would next draw your attention to the case of the Merangi Zemindari³ where the effect of grant from the Crown was in question. The history of the Zemindari was that it came into

(iii) where, subject to the provisions of rules (i) and (ii) among such persons some are related through males only and some through females, the person related through males only shall exclude the others; and amongst the others those shall be preferred in whose relationship the steps from the deceased proceed furthest through males;

(iv) where among such persons some stand in a nearer and some in a more remote relationship to the deceased, but both are equally qualified under the three preceding rules, those in the nearer degree shall exclude those in the more remote;

(v) where such persons stand in equal degree of relationship to the deceased and are equally qualified under the four preceding rules, the estate shall descend to the eldest male in the senior line but if there be no male heir in that line, then to the eldest male in the next senior line in which there is a male heir; and if there be no male heir in any line, then to the eldest female in the senior line.

Nothing contained in the former part of this section shall be construed to limit the power of alienation conferred by section 11.

(See sections 31 and 31A which enable alterations of the rule of intestate succession.)

¹ 5 I. A. 1.

² 22 All. 999 (P. C.). See also *Rajendra Bahadur Singh vs. Raghubans*, 40 All. 470 (P. C.).

³ *Sri Rana Satrucharla vs. Ramabhadra*, 14 Mad. 238 (P. C.).

the possession of the present family in the time of one of the rajas of Joypore, in whose reign the then zemindar tried to make himself independent but was in the end put to death, and Merangi was made over to Jagannath Razu, 'a principal Jetporean' who was called *Satrucharla* (destroyer of the enemy). About the year 1759, Merangi was incorporated with the neighbouring zemindari of Kurupam by a chieftain, who was afterwards overthrown, and both estates continued under Vizianagram till its dismemberment in 1795, when they were restored to the old families, *Satrucharla Ganga Raj* getting Merangi. He was a descendant of Jagannath Raz upon whom the title was first bestowed. On Mr. Webb taking charge of the district in 1759, Venkata Raz, the representative of the younger branch of the family formerly in possession of the Merangi zemindari, was in arms against the company, and his defection induced the collector to recommend Ganga Raz being appointed zemindar as well on account of his better pretensions than those of Venkata Raz as because he was descended from the elder branch of the family. The Government on this recommendation was of opinion that the permanent settlement "should be concluded with the rightful proprietor Ganga Razu." He, however, died before the Sanad was delivered to him and Chandra Sekhar, his son, received it on the 25th April, 1804. The latter fell into financial difficulties and his estate was sold off under a decree of the civil court to pay his debts. It was purchased by the Government on the 20th June, 1833. At this time a rebellion was going on in Palconadah and the dewan of the late zemindar of Merangi suppressed it, with the help of his retainers. They were offered a reward but entreated that instead of granting it to them, "the Government would be pleased to restore Merangi to the ancient family." Accordingly a new Sanad was granted, on the 22nd September, 1834, to the minor son of the late zemindar, Jagannadha. This Sanad was in the usual form of such documents. Jagannadha was succeeded by his son, also named Chandra Sekhar, during whose life no attempt at a partition

was made by his brothers. On Chandra Sekhar's death his son, Satrucharla Jagannadha Razu, succeeded and his uncles claimed a partition of the zemindari alleging that it was partible. Their Lordships of the Judicial Committee decided, "taking it, in accordance with the argument of the appellant's counsel, that impartibility was the rule applicable originally, that the subsequent dealings with the estate, the nature and terms of the grants under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary law of succession, and the character of the estate, which is in no way distinguishable from an ordinary zemindari subject to the payment of a fixed assessment of revenue, all clearly lead to the conclusion that the zemindari is now a partible estate in a question of succession." The grant of 1803 by the Government was not produced. But the corresponding Kabuliyat was there and from this the terms of Sanad-i-milkiyat-i-istimrari were gathered to be the ordinary terms of such grants. Their Lordships thought that there was nothing in the circumstances under which this grant was made to lead to the inference that the Government had in view, in making this new grant, the creation of an impartible zemindari as an exception to the ordinary rule of succession of the Hindu law. So according to the view expressed in this case the Sanad seems to give a fresh start to an estate and unless there is anything in its terms to the contrary the ordinary rule of succession would apply. The case seems further to decide that the previous nature of the estate will be of no consequence.

A similar view was taken in *Rajah Vankata Narashima Appa Rao vs. Rajah Naryya Appa Rao*¹ in which also the zemindari in dispute was indivisible and descendible to a single heir and was a military tenure prior to the British rule. The whole

estate was resumed by the British Government for arrears of revenue and in 1802 was granted to Ram Chandra by a Sanad, the provisions of which differed in no respect from an ordinary deed of permanent settlement. It was held that its character of indivisibility was not retained after grant by Sanad.

But the contrary seems to have been held in the Hunsapore case.¹ "The zemindari of Hunsapore is an impartible Raj, which by family usage and custom descended, for many generations, on the death of each successive Rajah, to his eldest male heir, according to the rule of primogeniture, subject to the burden of making Babooana allowance to the junior members of the family for maintenance. In the year 1767, the then reigning Rajah of Hunsapore having rebelled against the British Government, was expelled by force of arms, and the Raj confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately, in 1790, granted the Raj to C, a younger member of the family of F, on whom, some years afterwards, the Government conferred the title of Rajah." So the facts of the Merangi zemindari case all seem to be more favourable for holding that the estate would not change its nature in the hand of the Government. There the Government purchased the right, title and interest of the previous holder, and here in the Hunsapore case it acquired the property by force of arms. In the Merangi Zemindari case the Crown found out the eldest member of the eldest male line and settled the estate with him professedly on the ground of such person's better pretension to claim. But whatever might have been held in the Merangi case it was decided in the Hunsapore case "that although the Zemindari was to be treated as the self-acquired estate of C., yet the grant being from the ruling power in the absence of evidence of the

¹ For differences in the meaning of Saranjam and Inam, see 16 C. W. N. at p. 1067.

intention of the Grantors to the contrary, carried the incidents of the family-tenure as a Raj, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation, with no change other than that as affected F and his descendants, and was not, therefore, the creation of a new tenure but simply a change of tenant, by the exercise of vis major."

When there has been no earlier confiscation or acquisition by the Crown, but the holder of the estate is given a Sanad, it is reasonable to expect that such a Sanad would not in any way change the rule of succession. If any authority is needed for the proposition we may refer to the case of *Kachi Kaliyana vs. Kachiyuva*¹ in which the Zemindari in suit was part of a Polayam which up to 1765 was held by one member of the family only. On 23rd December 1817, a Sanad was granted to Rangappa, the then holder of the estate, conferring upon him the rights of a Zemindari under Regulation XXV of 1802, the Sanad being expressed to be granted in lieu of all former privileges. It was accepted as "settled law in this case that the acceptance of a Sanad in common under Regulation XXV of 1802, does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate."²

The question as to the nature of grants of jaghir has sometimes given some trouble. In the case of *Shrimanta Raja Bahadur Raghojirao Saheb vs. Shrimanta Raja Lakshman Rao Saheb*³ such a question went up to the Privy Council for decision. The circumstances out of which the appeal arose may be given as follows:—"The respondent and the appellant are half brothers, and the only surviving male representatives of the Nagpur branch of the Bhonsla family. It appears that in 1853,

¹ 32 I.A. 261.

² See also *Srimanta Raja Yarlagadda Millikarjuna vs. Srimanta Raja Yarlagadda Durga*, 17 I.A. 134.

³ 16 C.W.N. 1058 ; 17 C.L.J. 17.

Raghoji III, the last ruling Prince of Nagpur died, leaving four widows. The title of the Raja of Nagpur then became extinct. In 1858 proceedings were taken by the Inam Commissioner under the Inam Commissions Act of 1852, and the Government acting upon his reports, declared the whole estate to have lapsed, except a portion of it, in the districts of Poona, Ahmadnagar and Sholapur, which was continued as a matter of grace to the widows until the death of the last survivor of them. In 1855 the surviving widows of Raja Raghoji III, adopted Janoji Bhonsle, the father of the appellant and the respondent. Subsequently the Government of India, in consideration of the loyalty of the family and the services of a female member of it, named Rani Bakabai, during the Indian Mutiny, recognized or admitted the succession of Janoji, the adopted son, to certain Wattans, etc., held by the late ruler of Nagpur in the collectorate of Poona, Ahmadnagar, and Sholapur and in the Satara territory." This measure was confirmed by the Secretary of State for India in a despatch, dated the 7th of March, 1862. In a letter dated the 30th of March, 1860, the Government of India also agreed to the grant of the title of "Raja of Deur" to Janoji, and to the lands of Deur near Satara being attached to it, and directed that a Sanad to that effect should be prepared. Raja Janoji died in 1881 leaving him surviving three widows, three daughters, and two sons,—the appellant and the respondent. The appellant being the elder son, the respondent claimed a share in the property situate in the Bombay Presidency. The question was whether the property or any part of it was impartible? Various other points arose for decision in the case and their Lordships of the Judicial Committee were called upon to examine the nature of Jaghir grants. The Subordinate Judge remarked that the fact of lands being jaghir *per se* is not sufficient to make them impartible. Their Lordships disapproved of this statement and held, "The grants were manifestly grants in *Jaghir of the ordinary character*, that is to say, they were *personal and not hereditary* and were resumable

at pleasure. Being personal and temporary, they were 'necessarily impartible.' The impartibility of Jaghir lands is, however, entirely separated from the idea of succession. "It may be that upon the death of a Jaghirdar a fresh grant, again to one man, and again in return for personal service, was made; and it may also be that the one man selected was in the ordinary case the eldest son; but these matters of practice were not consequences of law, and the impartibility and unity which attached to personal service was not related to, but, on the contrary was distinct from, the idea of succession by force of law to the impartible lands." Any custom of primogeniture in case of a Jaghir land was held to be radically inconsistent with its personal and non-transmissive character.¹

In this connection their Lordships of the Judicial Committee had also to deal with the question of construction of grants by contemporaneous conduct. "Contemporanea expositio," they said, "as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application." When the Sanad however is admittedly ambiguous the importance of such evidence cannot be minimised. In construing the words of a grant, the ordinary rule is that the same principles of common sense and justice must apply whoever may be the grantor. Where, however, the words are not sufficiently clear, the doctrine that "if the King's grant can endure two intents, it shall be taken to the intent that makes most for the King's benefit" may perhaps apply.

But one should think that there is nothing to prevent the Crown granting a heritable Jaghir, though *prima facie* it is personal and for life. The Judicial Committee, however, though admitting this proposition seem always to have construed Jaghirs as non-heritable. Thus in Maharaja Ram Narayan

¹ See The Secretary of State, etc. *vs.* Srinibash Chariar, 40 Mad. 269.

Singh *vs.* Ram Saran Lal¹ though in the grant the estate was given "पुत्र पौत्रादि क्रमे" ² their Lordships declared it to be non-hereditary, saying, "A Jaghir must be taken *prima facie* to be an estate for life, although it may be granted in such terms as to make it hereditary. But the terms of the grant making it an estate of inheritance must be clearly unambiguous."

We shall close this chapter, noticing the nature of what is known as maintenance grants. These grants are carved out of impartible estates, and the question is whether the estate thus carved out will also retain the nature of impartibility. The question is really one of intention, and in every case the facts and circumstances special to it will be taken into consideration to find this out.³

¹ 29 C. L. J. 332 (P. C.).

² See also Gulabdas *vs.* Collector of Surat, 6 I. A. 54.

³ See Lal Gojendranath *vs.* Lal Mathuranath, 20 C. W. N. 876.

See also Udaya *vs.* Jadablal, 8 Cal. 199 (P. C.).

Sartaj Kuari *vs.* Deoraj, 10 All. 272 (P. C.).

Venkata *vs.* Court of Wards, 22 Mad. 383 (P. C.).

Durga Dutt *vs.* Rameshwar, 36 Cal. 943 (P. C.).

Ram Chandra *vs.* Mudeshwar, 33 Cal. 158.

CHAPTER IX

THE HISTORY OF PRIMOGENITURE IN BRITISH INDIA (CONTINUED)

Nature of the Property and the Law of Primogeniture.

We have observed elsewhere that the trend of ancient Aryan mind has been to continue joint though there was no legal bar to dissolution. It is indeed well known that though partition amongst brothers is perfectly legal, such a partition of the family inheritance has never been an ordinary result of the demise of its head. It was, in fact, this very retention of domicile and land in common in which observers of Indian institutions have found the origin of the village communities once prevalent in India. In such a joint family however the eldest son may very often be the head ; yet he scarcely has any right of ownership superior to those enjoyed by his brothers. Nay, sons and grandsons, we are told by Vijñaneswar, acquire interest in the family property even from their very birth, and are coparceners with their father and grandfather. An eldest son in such a family may have some representative rights, but he is far from being the 'coloured drone' of the English system. If anything like the English system of primogeniture is traceable in India, it is when we meet with the hereditary Zemindars and Talookdars, classes which owe their importance to the Muhammadan period, and whose proper position with reference to the land and the rival claims of the village communities or cultivators has for many years presented so perplexing a problem to the British Government.

The trend of the ancient Aryan mind to continue joint.

It has already been noticed how the origin of these Zemindaries and Talookdaries has been very variously traced, and how it is generally believed that in their origin these were mere offices gradually made hereditary even during the Hindu period. As has been observed, everything Hindu has a tendency to become hereditary. But the Mahomedan genius was opposed to it and as has been said by Phillips,¹ "it appears to be pretty certain that the Mahomedan government was throughout a non-hereditary system, while the Hindu system was essentially hereditary." Phillips continues, "And so we find that while the Hindu officers succeeded to their office simply by descent, or by the mixture of descent and election, which sometimes prevailed, yet this established hereditary right was not sufficient in Mahomedan times without some recognition by the state." "These Mahomedan rulers, however, continued the same revenue machinery and collected the revenue through the Hindu chowdries, and, where these had existed, Zemindars, as the established representatives of the cultivators and as the collectors of the revenue of a fiscal division or pergunnah." The only possible modification introduced by the Mahomedan rule in the system is noticed above, and with this change, the office practically continued hereditary. Of course it was never open to any officer to subdivide such fiscal divisions, and succession to office must always have been open only to a single heir.

How and when these offices became hereditary.

Though the Mahomedan rulers tried to keep the feeling alive that the Zemindary and Talookdary were mere offices and as such essentially non-hereditary, these Zemindars and Talookdars succeeded in making their offices completely hereditary even before the advent of the English in India. They became powerful in turbulent times, when the central government became extremely weak, little able to resist the encroachments of strong local

¹ T. L. L., p. 42.

chieftains, and scarcely anxious to do so, provided the customary revenue dues were punctually paid to the imperial treasury. In the era of violence and dormant anarchy it became of the utmost importance to the Zemindars to convert the system of appointments to the posts they held into a system of hereditary succession. The feeble government was unable to assert its rights, and the customary mandate of appointment, on the demise of a Zemindar, dwindled into a tacit recognition of his son and successor. It will be interesting to notice that the very fact that enabled these Zemindars to snatch this right, gave rise to the custom of primogeniture also. The encroaching landholders of these turbulent days must have thought it highly inexpedient to weaken their successors by subdivision, and when *might* alone would preserve them in right and power, none failed to observe the utility of unity; and Hindu mind, as we have seen, was never opposed to it.

Phillips however considers that this method of single succession, which is almost confined to the superior zemindaries, points to a descent of the zemindars from the ancient Rajahs. A Raj was, of course, in the main, a political office—having undoubtedly descended in this manner.¹ Though ancient Raj was not always indivisible, and though, as we have already noticed, these ancient Rajahs early succeeded in having almost absolute property right in these political offices, so much so, that not only these became perfectly hereditary, but very often we are told of a kingdom being divided into as many parts as there were sons of the last holder, yet what Phillips states is substantially correct. We have already noticed the several classes of Zemindars for our purpose, and have seen how it was quite possible for many of them to hold also private properties. But for any custom, such private properties should follow the ordinary rule of succession. In most cases, however, the whole,—the

Single succession,
what it indicates.

¹ T. L. L., p. 99.

Zemindar's office as well as his private estate,—would descend to the same single heir, others electing to remain joint with him, and gradually a custom of single succession even to such properties would grow.

We are here confronted with the question whether it was ever possible for the ancient Rajahs to have private properties—movable or immovable. We know, the metaphysical king has not always, in all systems, been kept distinct from the physical king, and it is needless to remind you of the early English confusion of the Crown with the individual holding the Crown which gave rise to the occasion for intimating to you of several "interregnums," and "of no king's peace" that could be broken. Indeed the conception of metaphysical beings has not always been very clear to the minds of the people, and all of you know what heated controversies still prevail over the nature of juristic persons. 'Are incorporeal persons fictional or real,' has been the question very often asked and discussed; and various theories about such persons have arisen as a result. Many jurists cannot believe in the reality of incorporeal persons. They would not call anything real that is not perceptible to the senses. Their reality lies only in natural and phenomenal objects, and they believe in the reality of the individual only,—the universal to them being only an abstract conception without any real existence. Philosophers like Puchta, Savigny, Unger, Bruns, Ihering, Windschied, Brinz, Bekker, Zietelmann and Gierke, have been arrayed on one side or the other, and it is needless to tell you that the controversy must have been very keen.¹ Puchta, Savigny and Unger teach that incorporeal persons are no better than mere fictions of positive, or ideal subjects created by the estate, though they recognise these as useful fictions. Bruns and a few others would not attribute to these

¹ See Miraglia, Chap. III, pp. 361-381,

the attributes belonging to individuals and would call them not a 'fictional person' but a '*quid simile*' of a person which exercises its functions and has its place "*personae vice fungitur*." Ihering, on the other hand, says that a juridical person is not the subject of rights, but a *simulacrum*, a simple mask, an empty form, an exterior shape invented for convenience and created as a means of mediation: the true subject of rights is still the man—the man who enjoys. Windscheid and Brinz in their zeal for denying the reality of incorporeal persons denies the well-established principle that rights must have a subject.

I would hardly be justified in detaining you over the question of real worth of these theories. While these and several other jurists vehemently denied the reality of incorporeal persons, Lasson, Zitelmann, Gierke and several others accepted its reality in an equally assertive manner. These believers in the reality of juristic persons look upon the State and moral entities as real organisms, efficient subjects of public rights. Zitelmann starts with the principle of personal will in which rights are inherent, and admits the reality of this principle in juridical persons as well as in individuals. The juridical person has capacity to will which is the test of personality. This will is the result "of the union of many wills considered, not in their integrity but in their reference to a definite purpose, creating a new, general and efficient will, which is the natural basis of a corporation."¹ Zitelmann would have his incorporeal persons as more real than the individuals, being a higher form of evolution. Dr. Bagchi has considered in his Tagore Law Lectures all these theories and has given his learned verdict in favour of the real existence of these incorporeal persons.

Whatever that be, king's land and Crown land have not always been kept distinct from each other, and once the dictum was that all lands descending on the Crown even from ancestors

King's land and
Crown land.

or collateral relations were held," *Jure coronoe*". Lord Brougham doubted the distinction in the *Lord Advocate vs. Lord Dunglas*,¹ where he had to deal with the question, and he said, "I must beg to enter my protest against the distinction which has been taken in arguing this case, as to the prerogatives of the Crown being different, where the Crown is supposed to be dealing with what is called its private and individual property and public property. The prerogative of the Crown is precisely the same as regards what is called the property of the sovereign, and the property of the public. It is only within the last half century that any private property has been acknowledged to exist in the Crown at all. All property of the Crown is held for public purposes, and is Crown property; it is public property which the Crown administers for the maintenance of the State." The question arose in connection with the following facts: The office of Chamberlain and Collector of Revenues payable to the Crown out of Ettrick forest was granted by George IV to Lord Dunglas for his life, with a yearly salary, as well in consideration of the office as out of royal bounty and favour, fixing an annuity or yearly salary of £300 to Lord Dunglas himself, £20 a year to his deputy or deputies, to be paid out of the moneys of the collection. If the annuity or salary of £320 cannot be obtained from the rents, the difference shall be made good out of the Crown revenues in the Lordship of Durham. The salary exceeded the money collected and was paid out of the Crown revenues as aforesaid for several years. After the demise of George IV, an action of reduction of this grant was brought and the question above referred to was raised in it.

In this connection I shall refer you to two Indian cases where the same question arose for decision. You will look to

¹ 911, and Fin. 2cl.

See also Comyn's Dig. title "Praerogative," D. 64, which supports this view.

the cases of *Elphinstone vs. Badree Chand*¹ and the *Advocate General of Bombay vs. Amerchand*; ² in the latter the question whether there is any distinction between the public and private property of an absolute sovereign had to be discussed, and Lord Tenterden enquired, "What is the distinction between the public and private property of an absolute sovereign?" and said "when you are speaking of the property of an absolute sovereign, there is no pretence of drawing such a distinction: the whole of it belongs to him as sovereign, and he may dispose of it for his public or private purposes in whatever way he may think proper." The case arose out of the following incidents: Peshwa Bajee Rao surrendered to Sir J. Malcolm on 3rd June 1818; one Naroba, who had been governor of Ryeghar under the Peshwa, surrendered the Fort on 9th June, 1818. By the articles of capitulation the inhabitants of the Fortress were allowed to go to whatever place they might choose and take their own property. Naroba was suspected of having sent away large quantities of the treasure of the Peshwa and subsequently the question arose whether these were the private properties of the Peshwa and as such could be removed.

So far as the English principle is concerned we may refer to Coke on Littleton. According to Coke such properties vest in the king in his natural capacity and he can deal with them like any other private owner. Statutes³ were passed in England to regulate questions regarding the private property of the British Sovereign, and the provisions of these Statutes would govern the question.

We hear from Allen⁴ that the ancient Anglo-Saxon kings had private estates which did not merge in the Crown, but were divisible by will, gift or sale: "Part of the lands they acquired was converted into

¹ Knapp's P. C. Cases, 316.

² *Ibid*, 329 n. (1830).

³ Statute 1 Anne, C. 7, 39, and 40 Geo. III, C. 88.

⁴ 'Royal Prerogatives,' p. 143.

estates of inheritance for individuals; part remained the property of the public and was left to the disposal of the State. The former was called Bocland; the latter, Folcland." This is sometimes traced to the ancient Roman system, and Puffendorf¹ referring to Grotius points out the distinction and lays down that the income may belong to the Sovereign, and be dealt with by him *differently* from the corpus of the property which goes to the State. Hallam² says, "Folcland, as the word imports, was the land of the folk or people. It was the property of the community; it might be occupied in common or possessed in severalty. Bocland was held by book, or charter. It was land that had been severed by an act of government from Folcland, and converted into an estate of perpetual inheritance. It might belong to the Church, to the king, or to a subject." According to Digby, "From very early times it was common to make grants of land to religious bodies or to individuals. The grants were effected by the king as the chief of the community, with the consent of the great men, who in conjunction with the great ecclesiastics, after the introduction of Christianity, formed the Witenagemot, or Assembly of the Wise"..... "*The king himself might be the grantee under one of these grants,*" and King Æthelwulf in fact made such a grant to himself.³

We hear of disposal of such private property of a king by will in *Ryves vs. the Duke of Wellington*:⁴ where a legatee claiming under an alleged will of George III with respect to a bequest made by that monarch of his private property under his Sign Manual in pursuance of 40 Geo. III, C. 88, S. 10, filed a bill against the executor of George IV, alleging that George

¹ B. VIII, C. 6, Secs. 22 and 23; Grot., B. III, C. 9 and 16.

² Middle Ages. See also Nelson's "The Law of Property," p. 73; and also Digby, Hist. Real Property, pp. 11, 15, 18.

³ See Digby, p. 14.

⁴ 9 Beav. 579 (1846).

IV and his executors had possessed the assets of George III, and it was alleged that the will had not been, and being a sovereign's will could not be, proved. The court of Chancery repudiated the jurisdiction of the court on the sole ground that the will had not been proved in the Prerogative court. The judgment ran as follows:—"This court gives relief 'only in cases where grants have been made of probate or letters of administration. And, unless, there be something to take this out of common rules, it is a sufficient objection to this Bill, that it seeks payment of a legacy, under a will of personal estate, of which it alleges that there neither is, nor can be, any probate.....I apprehend that this case is not such that if remedy be refused here, the party is necessarily deprived of all remedy. As regards his late Majesty King George IV, the plaintiff's claim against him was for the performance of a *personal* duty, involving his pecuniary interest.....I conceive that if the lady had a just claim against the *personal estate* of King George III in the hands of King George IV she might have brought forward her claim in the form of a petition of right, and the claim might have been investigated, through the medium of King's Court; so as to give jurisdiction which otherwise they would not have had."

Whatever other difficulties might have been felt in it, the distinction between public and private property of sovereign was not beyond comprehension of their Lordships who decided the case.

But let us see whether this distinction has always been kept in mind here in India. We take the case of the Secretary of State in Council of India *vs.* Kamachee Boye Sahaba.¹ Here Ameer Singh, a former Rajah of Tanjore, was in the year 1787 the absolute sovereign of Tanjore in the Presidency of Madras.

Indian decisions on the point.

¹ 7 M. I. A. 476.

In that and subsequent years three treaties¹ were entered into between the Rajahs of Tanjore and the East India Company and "Subject to the obligations to the British Government imposed by these treaties, the reigning Rajah of Tanjore remained sovereign of the country, and his power continued absolute, extending to the power of life and death." On the 29th October, 1855, Sevajee, the then reigning Rajah, died

¹ The first of these treaties was dated the 10th April, 1787, and made between Sir Archibald Campbell, the then Governor of Madras, and Ameer Singh. This treaty was annulled and replaced by the second one dated the 11th of June, 1793, made between Sir Charles Oakley, Governor of Madras, and Ameer Singh. The stipulations were as follows :—

Art. 1.—The friend and enemies of either of the contracting parties shall be considered the friends and enemies of both.

Art. 2.—In order to execute the foregoing Article in its full extent, the East India Company agree to maintain a military force; and the Rajah of Tanjore agrees to contribute annually a certain sum of money hereinafter mentioned as his share of the expenses of the said military force; the said Rajah further agreeing that the disposal of the said sum, together with the arrangement and employment of the troops supported by it, shall be left entirely to the said company.

* * * * *

Art. 8.—In case the said Rajah shall at any time have occasion for any number of troops for the collection of his revenues, the support of his authority or the good order and government of his country, the said company agree to furnish a sufficient number of troops for that purpose, on public representation being made by the said Rajah to the President in Council of Fort St. George, of the necessity of employing such troops, and of the objects to be obtained thereby.

* * * * *

The third treaty, dated the 25th October, 1799, was made between Sevajee, the then Rajah of Tanjore, and Benjamin Tovin, Resident at Tanjore, acting under powers from the Governor-General. Art. 2 of

"without leaving male issue or son by adoption, or any brother him surviving." Upon the fact of his death being communicated to the Court of Directors of the East India Company, they declared the dignity, Rajah of Tanjore, to be extinct and declared that the Raj of Tanjore lapsed to the British Government. In consequence of the lapse of the Raj, questions of maintenance of the late Rajah's family and other matters came before the Government of Madras for their decision. The matters that are of some importance to us are the following : *viz.*, questions relating to some villages belonging to the Raj in different parts of the Province, some retained by Sevajee when the country was assumed by the British Government and some subsequently acquired by purchase ; some debts due by the late Rajah to private parties ;

this treaty, after reciting that it had become indispensably necessary to establish a regular and permanent system for the better administration of the revenue of the country of Tanjore, stipulates, "that all former provisions for securing a partial or temporary interference on the part of the Hon'ble Company in the government or in the administration of the revenues of the country of Tanjore shall be entirely annulled ; and that in view thereof, a permanent system for the collection of the revenue, and for the administration of justice shall be established in the manner hereafter described." Then follow stipulations by which the Hon'ble Company reserves to it the liberty of ascertaining, determining and establishing rights of property and assessment, etc., and it is further stipulated by Art. 4 that "A court, or courts, shall be established for the due administration of civil and criminal justice, under the *sole authority* of the English East India Company. The said courts shall be composed of officers to be appointed by the Governor in Council of Fort St. George for the time being, and shall in no instance whatever be subjected to the control, authority or interference of the said Rajah ; but shall be conducted according to such Ordinances and Regulations as shall, from time to time, be enacted and published by the said Governor in Council."

It is indeed difficult to see how even after this the Rajah was the Sovereign of Tanjore.

and the State jewels of gréat value, a valuable library of Oriental works, and an armoury. On the 18th October, 1865, Mr. Forbes took possession of the property within the Fort of Tanjore and of the lands held* by the late Rajah, or held by those who held them under sunnuds of the Rajah. The respondents thereupon on the 18th November, 1866, filed a bill on the equity side of the Supreme Court at Madras, against the East India Company. The bill stated, that Sevajee at the time of his death, was possessed of, and entitled to, *as of his own right and private property*, and distinct from the property belonging to the Rajah of Tanjore, large estates, both real and personal, of the value of many lacs of rupees ; that on the death of Sevajee, the respondent, as his eldest widow, according to Hindoo law, became entitled to inherit and possess his private and particular estate, real and personal, and to administer the same. The Supreme Court at Madras granted an injunction restraining Mr. Forbes from proceeding with the sale. East India Company in its answer stated that Rajah Sevajee was up to and at the time of his death, Rajah and reigning monarch of Tanjore, and was a sovereign prince entitled to and in the exercise and enjoyment of the rights, privileges, powers and dignity of an absolute sovereign within Tanjore, and that in taking possession of the property of the late Rajah, the Company acted in their public political capacity and in the exercise of the general powers, privileges and authorities vested in them by the various Charters and Acts of Parliament, etc.

We are not concerned with the decision on all the points raised in the suit. But there is one point in the case which deserves our notice. The defendants raised the contention that no distinction can be allowed between the public and private property of an absolute sovereign as he can dispose of the whole of it as he may think fit. In answer it was contended that "there is a distinction between the public and private property of a Hindoo sovereign, and that although during his life, if he be an absolute Mōnarch, he may dispose of all alike,

yet on his death some portions of his property, termed his private propetry, will go to one set of heirs, and the Raj with that portion of the property which is called public, will go to the succeeding Rajah" ¹ Their Lordships did not decide the point, but seem to have intimated an assent to this contention as, in their opinion, they had no jurisdiction in the matter, it being an act of a Sovereign power.

Upon the receipt of this judgment certain proceedings took place in India which were recorded in the minute by the President Sir Charles E. Trevelyan, the 6th paragraph of which dealt with the matter, and this ran as follows :—"A great deal of discussion has taken place about what ought to be considered public and private property. This seems to me to proceed upon a mistaken view of the nature of the case. The Raj has merged in the Government of India. Everything which belonged to the late Rajah at the time of his death, therefore, now belongs, by right, to the Government. If previously to his decease, he had made a *bonafide* alienation of any property acquired out of his savings, that property has passed into the condition of private property. Otherwise, all that he left would have descended to his heir, if he had had one ; and not having had one, it has lapsed to the paramount authority representing the general public. We have to pay the late Rajah's debts, and to provide for his numerous relations and dependents as *ultimus hoeres* ; and we are entitled, in the same character, to all that remained of his property. It would not have been possible for any one except the successor to the Raj to have undertaken these obligations. To any other, the loss would have greatly exceeded the advantage. The view taken in this paragraph is the same which is maintained by the Advocate Generals at Calcutta and Madras." ²

¹ 7 M.I.A. at p. 537.

Ibid, p. 543.

The question seems hardly to have received the proper answer. If it is possible for a Rajah to have private property of his own apart from what he has as Rajah, then surely such property should descend to his heirs under his personal law. It may be that the successor to the Raj would also be his heir. But it is quite possible that the two shall be different persons. As to the liability to pay his debts, here again the question would depend upon whether the debt is his personal debt or not. If Sevajee, treated as a private individual, owned property and had debts, both these ought to have gone to his heir and not to the successor to the Raj. The Raj would always descend to the single successor ; but the Rajah's private property and debts need not do so.

In these cases, however, it was the property of the enemy that was in question. In cases arising out of seizure of an enemy's property no distinction need be allowed between his public and private property.¹

When such is not the case, the distinction has not always been lost sight of. We might refer to the case of Maharajah Pertab Narain Singh *vs.* Maharanee Subhao Koer.² The property which was the subject of this suit belonged to Man Singh before the annexation of Oudh. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as Talukdar was duly confirmed by Sanad. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir not necessarily determinable by the strict rule of primogeniture.

The question which had to be decided in the case is not of any importance to us here. But in their judgment delivered

¹ See Act. Genl., *vs.* Weeden, Parker's Report 267.

² 4 I.A. 228 ; 3 Cal. 626 (P.C.) (1878).

by Sir J. Colvile, their Lordships while declaring in favour of the appellant observed, "The declaration, however, must, their Lordships think, be limited to the Taluks and what passes with it. If the Maharajah had personal or other property, not properly parcel of the Taluqdari estate, that would seem to be descendible according to the ordinary law of succession." Here then their Lordships recognized the distinction which unfortunately has not always been kept in view by the same Board.

We may next refer to *Rani Parbatikumari Debi vs. Jagadish Chunder Dhabal*.¹ The dispute here related to the right of succession to the Jungle Mahal estate and Raj of Jamboni. The last male holder, Raja Purno Chunder Dhabal, died without male issue on 23rd August, 1886. He left two widows and a half brother. The widow brought the suit claiming the whole estate and his self-acquired property. Several questions were raised in this case. But the one with which we are concerned here was whether the properties in schedule 'C' of the plaint were the self-acquired properties of the plaintiff's husband. This schedule 'C' contained four moujahs purchased for Purna Chunder by the Court of Wards out of the

Savings of an impartible estate, if also impartible.

savings of the zemindari and must be considered as Purna Chunder's savings. Their Lordships in delivering judgment observed, "All that the respondents can point to as indicating Purna's intention to deal with them as part of the Raj is that the rents were collected by the same servant, and the collection papers kept with the papers of the Raj. Their Lordships do not find in these meagre facts adequate ground for holding that the Raja intended to incorporate the four moujahs with the ancestral estate for the purposes of his succession. The four moujahs must therefore follow the rule of the Mitakshara law as self-acquired property."

¹ 29 I. A. 82=29 Cal. 433 (P. C.) (1902). Followed I.L.R. 2 Pat. 319 (P.C.). See also 42 C.L.J. 280 unrealised rents of an accretion.

Unfortunately their Lordships here had not to deal with the question with reference to two claimants both of whom would succeed to ancestral property when the property is not subject to the rule of single succession, whilst only one of them would succeed to the impartible estate. In a case like this, even assuming that the last holder intended to incorporate his acquisitions with the impartible estate, it is difficult to see that by this fact such acquisitions would acquire impartible nature. It is hardly open to an individual to create an impartible estate in this manner. Once it is admitted that it is open to the holder of an impartible estate to have property which may not form part of the estate, it is difficult to escape the conclusion that such property must follow a rule of succession different from the customary rule governing succession to the impartible estate. If even here the rule of succession is not that given by the general law, a custom to the contrary must be proved. Of course such acquired properties may be looked upon as accretions to the impartible estate; but whether or not these would be accretions to the estate would not be made to depend upon an individual's intention. If in *Tagore vs.*

Intention of the holder of the impartible estate, if to guide.

Tagore a private individual was not allowed to create his own law of succession it should not equally be open to an individual holding

an impartible estate descending by the rule of primogeniture, to intend so as to give a different law of succession to a property that was never impartible before he so intended. •

Yet this intention was again adverted to in *Janki Pershad Singh vs. Dwarka Pershad Singh*.¹ In this case Dwarka Pershad brought a suit in the court of the Subordinate Judge of Barabanki for partition of certain properties known as Taluqa Ramman in which he claimed a share as a member of a joint Hindu family governed by the Mitakshara law. "The nucleus of the Taluque in dispute is said to have been formed by one

¹ 40 I. A. 170=18 C.L.J. 200=17 C.W.N. 1029.

Suk Shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the 18th century. In 1856 when the British first occupied the kingdom of Oudh, the Taluque included 21 villages, and was held by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grandfather of Suk Shah. On the outbreak of the Mutiny, Autar is said to have disappeared. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But some time in July 1859 Autar appeared before the authorities, explained the reason of his non-appearance before, and applied for settlement of his villages. The authorities were satisfied and an order was passed sanctioning the summary settlement with him of the remaining nine villages which had not been finally settled with others. The *kabuliyat*, however, was not signed by him until the 13th of that month."

"In the course of the Regular Settlement which followed shortly after, Autar recovered decrees for possession of six more villages. He was thus in possession of some 15 villages when Act I of 1869 was passed into law. Later on he acquired by purchase several other properties."

"Autar died in 1879 without issue and was succeeded in the possession of the properties by his nephew Jang Bahadur, the eldest son of his brother, Bisheshur. Jang Bahadur died in 1889, leaving him surviving two sons, *viz.*, the plaintiff and the defendant, Janki Pershad, the latter being the eldest. On Jang Bahadur's death Janki Pershad came into the possession of the entire property."

The Subordinate Judge held that the properties which were settled with Autar in 1859, together with those decreed to him in the course of the Regular Settlement, formed an 'Estate'¹

¹ The case much depended on the meaning of the word 'estate' as used in Oudh Estates Act. See 17 C.W.N., p. 1037.

within the meaning of Act I of 1869 and were descendible to a single heir and were consequently impartible. But as regards the several properties Autar Singh acquired by purchase subsequent to the Regular Settlement the Trial Judge was of opinion that in the absence of evidence establishing an intention on his part to incorporate the subsequent acquisitions with the 'Estate'¹ they must be held to be governed by the ordinary Hindu law of inheritance.

With reference to these subsequent acquisitions their Lordships of the Judicial Committee observed, "It is contended on behalf of the defendant that by the custom of the family these acquisitions became part of the original estate, and are, therefore, not subject to the ordinary rules of inheritance. Both the Courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom. And no adequate reason has been shown to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the Taluque. As has been pointed out by this Board in the case of *Parbatikumari Debi vs. Jagadishchandra Dhabal* the question whether properties acquired by an owner become part of the "ancestral estate for the purpose of his succession depends on his intention to incorporate the acquisitions with the original estate." The Courts in India having concurrently found against the defendant on this point their Lordships did not see any reason to differ from that conclusion. In the recent case of *Rani Jagadamba Kumari vs. Thakur Wazir Narayan Singha*, however, their Lordships of the Judicial Committee seem to intimate that in determining this question of accretion, it is the nature of the property and not the mere intention of the holder of the impartible estate that will have to be considered. The facts of the case, so far as

¹ 50 I.A. 1=28 C.W.N. 98=37 C.L.J. 287.

the point under discussion is concerned, are as follows : the suit was instituted by the predecessor-in-interest of the respondent to establish his title to the estate of late Raja Saroda Narayan, the Raja of Serampore, against the appellant, who was the widow of the Raja and the person in possession of the Raj under the court of wards on the death of her husband. The property in dispute consisted of (1) the impartible Raj, (2) immovable properties acquired by the Raja, (3) movable properties, particularly G. P. Notes, acquired by the Raja. The respondent claimed to succeed on the grounds that (1) by virtue of a custom the females were excluded from succession, (2) and he was the nearest male agnate of the deceased. Several contentions were raised by the appellant, the defendant in the suit ; but the one, that we are now concerned with, is, that in any event only the ancestral Raj was joint property, and that all property acquired by the late Raja himself, on his death, passed to his widow. The Subordinate Judge held that the plaintiff has succeeded in proving his title to the impartible Raj, and with regard to the property acquired by the late Raja, he decided, that it was an accretion to the impartible estate, and decreed the plaintiff's suit fully. On appeal by the present appellant before the High Court of Patna, the decree was affirmed in all particulars except the decree for the G. P. Notes as being an accretion to the Raj, and their Lordships made this modification that the Government Promissory Notes, which the late Rajah held had not been incorporated by him with the impartible estate.

On appeal by the Rani to the Judicial Committee, Lord Buckmaster dissented from the view expressed by the courts below on the theory of accretion, and his Lordship expressed as follows : " with the exception of the Government Promissory Notes the whole of these (acquisitions) have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong, and that its error is due to the

idea that the produce of an impartible estate naturally belongs to and forms an accretion to the original property. In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely dissociated from the Raj. Nor could the monies have been used by him for the purpose of acquiring or endowing an impartible estate. It is, therefore, a strong assumption to make that the income of the property of the nature is so affected by the source from which it came that it still retains its original character."

In this judgment their Lordships seem to have pronounced with a degree of certainty the true nature of the acquisitions of the holder of an impartible Raj; and although their Lordships had to consider this point in the earlier cases of *Srimati Rani Parbatikumari Debi vs. Jagadischandra Dhabal*,¹ *Janakipershad Singh vs. Dwarakaprosad Singh*,² *Murtaza Hussan Khan vs. Mahomed Tasim Ali*,³ no such definite enunciation of the principle involved was laid down. But even in this case their Lordships seem to have kept this question open for further development, when their Lordships say, "whether it be possible in any circumstances to treat movable property as an accretion to a landed estate of this character is a matter not arising for decision." The decision therefore practically leaves the matter where it was, except this, that regarding the income of an impartible Raj, no such presumption or consideration as arises regarding the earnings of a member of an undivided Mitakshara joint Hindu family, does apply, and its immediate effect is that the onus is shifted from the defendant to the plaintiff. The first of the observations of their Lordships of the

¹ 29 I.A. 82=6 C.W.N. 490=29 Cal. 433.

² 40 I.A. 170=35 All. 391=17 C.W.N. 1029.

³ 43 I.A. 269=21 C.W.N. 410.

Judicial Committee quoted above, seem to lend an opinion that the methods of dealing with the acquisition and the intention of the deceased holder of the impartible estate, may supply one of the elements for making a judicial pronouncement on the nature of the acquisitions.

To whichever class a zeminder may belong, it is always possible for him to have private family lands as distinct from his office, and also from what Patton marks out as his official land. ^{Zeminders might always have private properties.} "It seems, therefore, to be clearly established," says Patton,¹ "that the zeminders could not possibly be the proprietors of the lands, the rent of which they were required, as the aumils of Government, to collect from the proprietors. But there was another description of land within the districts of the zemindars, of which they were the undoubted proprietors, which was distinguished by the name of *nankur land* and which paid no rent at all to Government. The zemindar had it in absolute property in lieu or in part of salary of office; for which reason it might be styled with propriety his official land." These official lands would naturally go to the office holder, and when in course of time the zemindar succeeded in securing the zemindary as his property, these lands would equally form part of such an estate. But there might have been other lands which would have no connection with the office and should not, in theory, form part of the zemindary estate unless through some confusion these gradually lose their distinctive nature. Such lands should descend by the ordinary law governing the family² and if any other rule of descent be pleaded the party alleging it must prove it, as such rule can arise only under a special custom. But if you refer to *Murtaza Hossain Khan vs. Mohammad*

¹ Asiatic Monarchies, p. 156.

² See *Sethuram vs. Meraswamir*, 45 Mad. 296 (P.C.); *Sukdeb vs. Balia*, 19 C.L.J. 255; *Secretary of State vs. Kamachee Bai*, 7 M.I.A. 76.

Iasain Ali Khan¹ you will find a contrary rule laid down by the Judicial Committee. In this case, the question of succession to non-talukdari property of an Oudh Talukdar was raised, and it was held by the Judicial Committee that in the case of a Mahomedan Talukdar the existence of the pre-existing custom gave rise to a presumption that the custom applied to non-talukdari property as well, and the person who alleges that there is a different course of succession in respect of the non-talukdari property must prove his allegation.

Raja Azam Ali Khan, whose taluka of Deogaon was included in list 2 mentioned in the Oudh Estates Act, died possessed of considerable other property also. He left two sons; the elder Mustafa succeeded to the Taluka by the rule laid down in section 22 of the Act. The younger son, the present appellant, sued for a half-share of the non-talukdari property which he claimed as co-heir with Mustafa under the ordinary Mahomedan law of inheritance. The judgment of the Judicial Committee was delivered by Mr. Ameer Ali who distinguished the cases of Maharaja Pertab Narain Singh *vs.* Moharanee Subhao Koer,² Rani Parbati Kumari Debi *vs.* Jagadish Chandra Dhabal,³ and Janaki Pershad Singh *vs.* Dwarka Pershad Singh⁴ and observed: "The Mahomedan Law makes no distinction between ancestral and self-acquired property, and recognizes no principle of differentiation in the matter of lineal and collateral succession, as is the case under the Mitakshara which divides inheritance into unobstructed and obstructed heritage. All classes of property, whether ancestral or self-acquired, follow one rule of devolution. If a custom governs the succession to the ancestral estate, the presumption is that, it attaches also to the personal acquisitions of the last owner left by him on his

¹ 25 C.L.J. 1 (P.C.) = 21 C.W.N. 410 = 43 I. A. 269, 281.

² 3 Cal. 626 (P.C.).

³ 29 Cal. 433 (P.C.).

⁴ 18 C.L.J. 200 (P.C.).

death ; and it is for the person who asserts that these properties follow a line of devolution different from that of taluka to establish it." ¹

It is difficult to see why it should be so. Their Lordships seem to forget that the custom in question must have, at its inception been connected with succession to the taluka only, which, being in the nature of office, was indivisible and hence descendible only to a single heir. If the holder of the office had private property, that need not have descended to this single heir also, and so the custom of single succession might not have touched the rule of succession to non-taluka property. At any rate, so far as the non-taluka property is concerned, the custom of single succession in a Mahomedan family would be a custom *dehors* the ordinary rule and as such the onus of establishing it should lie on him who asserts such a custom. The cases which their Lordships sought to distinguish were scarcely distinguishable ; though these were cases under the Mitakshara law, the real question in them as well in the present case, was whether the holder of an impartible estate can have separate property unconnected with the estate and what would be the rule of succession to such a property.

The case of Thakur Ishri Singh *vs.* Thakur Baldeo Singh ² may be next referred to. At the Settlement of Oudh in 1858-59, the village lands of Kanhmow, Hasnapur and Nimchaina, in the district of Faizabad, were treated as a Taluka named Kanhmow, and settled with Thakur Beni Singh, who, in common with the other taluqdars of Oudh, was requested in July 1861, by the Chief Commissioners, to state what was the rule of succession in his family. Beni Sing replied that the custom of his family was that the family estate should be held by one male member,

¹ It will be interesting to notice the history of Jāmshēd Ali Khan's family. See 25 C.L.J. at p. 15.

² 10 Cal. 792 (P.C.).

selected for his fitness, and he asked that after his death the Government would select one of his three sons, Thakur Maharaj Singh, Thakur Ishri Singh and Thakur Baldeo Singh, whom it might deem most fit to succeed him. This answer not having been considered satisfactory by the Government on the 8th March, 1860, Beni Singh submitted another reply in the following terms : "whereas the British Government has granted to me for generation after generation, the proprietary rights in the Ilka Kanhmow, situate in Pargana and Tehsil Basi: Taluqa Usri, situate in Pargana Pirnagar, Tehsil Sitapur; Taluqa Hasnapur, situate in Tehsil Bisw and Taluqa Nim Chaina, situate in Pergana Maholi, Tehsil Misrith, *I desire and hereby pray that after my death my Ilaka be maintained entire and undivided in my family according to the custom of 'Raj-gaddi' and the younger brothers be entitled to receive maintenance from the person in possession of the estate (Gaddi-nashin).*"

No further correspondence ensued, and after the passing of the Oudh Estates Act¹ the taluqa was entered in the *first and second* of the lists prepared in accordance with the requirements of that Act; but not in the third list.² Beni Singh having died on the 19th September, 1870, the eldest son, Maharaj Singh, succeeded, and was recognized by the Revenue authorities. Maharaj Singh executed in favour of the youngest brother, Baldeo Singh, a document whereby he declared, "after my death, my aforesaid brother Baldeo Singh shall hold and enjoy the same like myself." Maharaj Singh died without issue on the 19th November, 1879, and Baldeo Singh being recognized as his successor by the Revenue authorities, Ishri Singh,

¹ Act I of 1869.

² See sec. 8, Oudh Estates Act.

First list is of all persons who are to be considered taluqdars.

Second list of the taluqdars whose estates devolve on single heir by family custom.

Third list of taluqdars who took Primogeniture *Sanad*.

the second brother opposed him and claimed as the brother next in succession to Maharaj Singh. Subject-matter of the suit was not only the taluqa covered by the above document of the Maharaj Singh, but also some other things named in list B attached to the plaint. Baldeo succeeded on the strength of the above document so far as the taluqa was concerned. As regards other properties, their Lordships were of opinion that even with respect to them a family custom had been established according to which these would descend to the ablest member of the family selected by the previous holder. The point that you should notice for our consideration in this case is that a distinction was recognized between the taluqa and non-taluqa properties possibly governed by different rules of descent.

One thing I should ask you to remember very carefully is that in these Oudh cases the taluqas were all creatures of Crown grants, and the Crown ascertained and showed a good deal of consideration for the expressed desire of the person to whom it was granted as to the future rule of succession to the taluqa.¹

Although an estate be not what is technically known in the north of India as a Raj or what is known in the South as a Pollian, the succession thereto may still be governed by the rule of primogeniture under a Kulachar or family custom.

Chintamuni Singh *vs.* Nowlukho Konwari² is an authority for this. The dispute here related to an estate known as the talook of Gungore and other property left by one Runjeet Singh, the defendant's deceased husband. Plaintiff alleged that Gungore was ancestral property of a joint Mitakshara family, of which he and the deceased Runjeet were members;—that by virtue of a custom prevailing in the family, the talook was impartible, being enjoyed by a single member of the family at a time and devolved on the death of the holder on his eldest

¹ See also Achal Ram *vs.* Udai Peltab, 10 Cal. 511 (P.C.).

² 1 Cal. 153 (P.C.).

male heir.^c It seemed to their Lordships "too late to question what is affirmed by many reported cases, that a custom of descent according to the law of primogeniture may exist by 'Kulachar' or family custom, although the estate may not be what is technically known either as a Raj in the north of India or as a Pollian in the South of India."

Primogenitary rules are not thus confined to estates contemplated by Phillips. It has been said that impartibility is not so much an incident attached to the property of a family but to the law governing that particular family.¹ If this view be correct then whatever property come to the family by any subsequent acquisition shall descend to a single heir and an impartible estate going out of the family may become partible. This seems hardly consistent with the history of impartibility or unity of holding. If in its origin it was an office, impartibility should be an incident attached to the estate itself, the very nature of the estate being responsible for the origin of impartibility. The dictum may be partially true only when the custom grew out of continuous jointness of an ordinary family property. Ordinarily, however, impartibility is the quality of an estate and it is only with reference to an estate that the custom defines its nature.² It is needless to remind

Impartibility, if an incident of the property.

¹ Venkata *vs.* Udaygiri 41 I.C. 208=21 M.L.J. 351.

Zemindar *vs.* Subbaya, 43 I.C. 871.

² See Ekraleshwar *vs.* Janeshawar, 42 Cal. 582 (P.C.).

This case decided the following points :—

"By Kulachar or family custom, the right of succession to the gauddi and to the properties of the Durbhanga Raj Reasat descends according to the rule of primogeniture. The younger sons of the Maharaja who are styled 'Babus' are by 'Kulachar' entitled each by way of a babuana grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaj gets, by way of Sohag grant, the usufruct of a

you that though impartibility, would necessarily mean single succession or unity of heir, it would hardly imply any rule of primogeniture. Where primogeniture arises, it arises by custom, and it would be correct to say of this primogeniture as a custom of the family only.

I shall not detain you any longer. But before we leave this subject you will remember how in several cases Judicial Committee attached much importance to the intention of the holders of the family impartible estates in making after-acquired properties also impartible. If intention of individuals can indeed determine the question, you will naturally be led to think how far impartibility may be the result of any recent contract. You

portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property granted continues to form part of the Raj Reasat from which it is never separated being entered in the Government Revenue Register under the name of the Maharaja for the time being as proprietor and reverts to the Maharaja for the time being on the failure of male descendants in the male line of the grantee.

"Babuana and Sohag grants differ essentially in their nature from absolute grants and are subject to the Kulachar under which they are authorized and in accordance with which they are made.

"In each case females, widows and daughters and descendants of daughters are by custom excluded by custom from the succession.

"Babuana and Sohag lands descend in the family of Durbhanga, not to one male heir only but to all the existing male heirs in the male line of the grantee as co-parcenars.

"In certain Sanads which testified to grants by way of babuana, the expression 'aurosa Putra Pautradi' was used to indicate the course of descent. But it was held that as such grants could not be made under the ordinary Hindu Law but were authorised only by the custom, which excluded females from succession the words 'aurasa Putra Pautradi' should be regarded as words of limitation consistent with the custom and not as words of general inheritance."

See Durgadit Singh *vs.* Rameswar Singh in (1900) 36 Cal. 943 (P.C.). Contrary was held in this case ; but it was *so held on admission*.

know this is hardly possible, and you have very often noticed how a contract amongst the members of a joint family that they will live jointly and will never come to partition would its binding force always beyond the original contracting parties,¹ and sometimes would not even bind the parties themselves. Yet it is not impossible to conceive of implied or express contracts which perhaps were at the root of the subsequently developed custom, and, as we have already noticed, our Hindu commentators did, as a matter of fact, conceive of primogenitary rules as based on consent. In the next lecture also we shall have occasion to refer to such contractual origin of the custom of impartibility and primogeniture.² This is, however, no authority for any recent contract possessing force to produce such a result.

Nasratullah vs. Mujibullah, 13 All. 309 ;

Bishweswar vs. Ram Prasad, 28 All. 627 ;

Madan vs. Baikunta, 10 C.W.N. 39 ;

Muherje vs. Afzel Beg, 37 All. 155.

See *Kishore Singh vs. Gahena Bai*, 24 C.W.N. 601 (P.C.)

CHAPTER X

THE HISTORY OF PRIMOGENITURE IN BRITISH INDIA (CONTINUED)

Nature of the Estate taken by the Primogenitus and the Rules of Succession to it.

The rule of primogeniture is the creature of custom, and there is little difficulty in determining the next successor if the question is covered by the custom. In families governed by the Dayabhaga law again the question can hardly assume any difficult character; for in such a family, the rule of succession shall have very little to do with the question of jointness or separation of the family. The system, however, which still attaches much importance to the status of the family, and according to which there is a sort of family co-ownership, cannot ignore the question as to the nature of the estate taken by the single heir, and what rule of succession shall apply to such estates. The great volume of cases on the point to be found in our Indian Law reports is ample evidence of the practical importance of the question.

Early family co-ownership is indeed a natural growth. "When the family becomes certain and establishes itself in certain places, its definiteness prompts its members to the cultivation of land, and later makes the beginning of ownership which appears as a collection of means suitable to the preservation and development of that collective body. Ownership in a family should undergo modification according to the nature and

purpose of the family itself, which is an interpenetration of persons, a communion of sentiments, affections, ideas and wills. There cannot fail to be co-ownership."¹ Every participator in the community shall be a co-owner. "The sons, participators in the community, did not acquire upon the death of the father, a new right but merely obtained greater freedom in the administration of the goods." If Jimutavahana is inaccurate historically in saying, सम्बन्धिनिधनमेव सत्त्वकारणम्, and if what he cites as his authority: "जह् पितुश्च मातुश्च समेत्य भ्रातरः समम्। भजेरन् पैत्रिकं रिक्थमनोशास्त्रे हि जिवतोः," relates to a stage later than the original, Vijñaneshwara is equally incorrect in pointing out the very fact of birth as the cause of co-ownership. And Harita indeed seems to give the correct view in saying, "While the father lives, sons have no independent power in regard to the receipt, expenditure and bailment of wealth." Indeed, this domestic co-ownership, when rigorously understood, would render the goods of the family inalienable, and this is one of the reasons urged against it by Jimutavahana. This inalienability of family goods was once the principle of all primitive laws. That this was so in India is amply borne out by the several texts cited by Jimutavahana and Vijñaneshwara though these great scholars understood them very differently. The texts like "though immovables and bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons," and "lands pass by six formalities: by consent of townsmen, of kinsmen, of neighbours and of heirs, and by gift of gold and of water," surely point to these early stages. Subsequent development of strict *Patria potestas* might have some hand in developing a sentiment against son's co-ownership.

It is indeed difficult to trace the development of domestic co-ownership through all its stages. In its later developed form it did not mean inalienability of the property. It is not

¹ Miraglia, p. 745.

a "*communio pro indiviso*," inasmuch as the co-owner has no equal right to individual ownership. The family is an unequal society with superiors and inferiors, though this inequality does not render the co-ownership impossible, but only makes the different members enjoy an unequal property right. "Domestic co-ownership is *sui generis* and pre-supposes that important distinction between relative and absolute property originally conceived by Rosmini."¹ The father, head, governor and representative of the family may have a sort of full and absolute right, the other members having some relative rights conditioned upon the death of the father. This fact indeed is very often missed by the Judges and jurists, and when we shall deal with the case law on the question of the nature of the estate taken by the primogenitus, we shall see, how having lost sight of this principle, great confusions have been created in the law. When Sartaj Kuari's case decided that no co-parcenary in impartible estates descendible by the rules of primogeniture was possible because partition of such property could not be claimed, their Lordships perhaps failed to appreciate this possible foundation of family co-ownership. They might have given the holder full right, yet might have found co-ownership in the estate, had they only appreciated this view of Rosmini. "Whoever," Rosmini says, "has full property right in something over which another person has a relative property right, can use and *consume* the thing to a definite and reasonable extent. If there is co-ownership, which is an association between him who has a full right and him who has a relative right, the first must use it for the purpose of the co-ownership and society. To the absolute owner, that is, to the head, belongs the decision of what are necessary or useful expenses of the family according to the norm of a wise control. The nature of relative property being what it is, and this right of property not being limited except in relation to a full owner, it

¹ Miraglia, p. 746.

follows that he has a right above all other persons to its use and control; and that upon the death of the full owner these goods become his absolutely."¹ From this, according to Rosmini, follows the right of the relative owners to demand that the property must be so placed by the full owner that at his death there may be no difficulty in distinguishing it so that the relative owner may succeed to it. Intestacy indeed would be the rule in such cases; but certainly partibility may have nothing to do with it.

Family ties and family property are indeed usually considered from the point of view of successive generations and of inheritance, as such questions seem to be the invariable concomitants of the relation. In ancient life however the principal fact governing these relations was not the disruption of the family organization, but its continuity; and there was indeed no compelling reason for dissolving it in connection with the death of a particular member, even if the member in question happened to be the ruler or manager of the concern. The persistent maintenance of corporate units is not an unfamiliar fact even in our own days. The State, the Church, a Corporation, a teaching institution can go on, and there is hardly any inherent reason for treating the combination of persons and things constituting a household unit in a different way. Every partition and dismemberment is bound to produce some loss and dislocation, and while such losses have to be incurred now-a-days in order to satisfy the claims of individuals, the natural bent of ancient Aryan custom was in the direction of keeping up the unity of the household even at the cost of curtailing individual tendencies.²

¹ *Ibid*, p. 747.

² I would again draw your attention to "Gaja Kacchapa" story given in the Mahabharata, Adi Parva, Chapter XXIX. Partition has already begun to be legal; yet it was not what the public opinion approved of.

Partibility thus need not be a necessary incident of co-ownership. Co-ownership can exist and yet the custom of impartibility and single succession can grow. Judges of our courts have however thought differently, and in an examination of the development of the primogenitary rules we can hardly afford to ignore this Judge-made law.

We shall begin with the question as to the nature of the estate taken by the primogenitus: whether the estate is, in his hand, a separate estate of his which would descend to his heirs, or whether it is only an estate in which other members of the family shall have co-ownership, and as such, on his death whoever takes, will take his own property, will have his own relative rights developed into a fuller one. For this purpose we begin with the case of *Katama Natchier vs. Srimut Rajah Moottoo Vijaya Raganadha Bodha Goroo Swamy Perya Odaya Taver*.¹

This case was decided in 1863 and the subject-matter of the dispute was the Zemindary of Shivaganga in Madras which was in the nature of a principality and capable of enjoyment by only one member of the family at a time. "This Zemindary was created in the year 1730, by the then Nabab of the Carnatic, in favour of one Shasavarna, on the extinction of whose lineal descendants in 1801, it was treated as an escheat by the East India Company which had then become possessed of the Sovereign rights of the Nabab of Karnatic, and was granted by the Madras Government to Gourivallabha Taver. He had an *elder brother* named Oya Taver, who predeceased him, dying in 1815." Gourivallabha died in 1829. He had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead) who left a son named Vadooga Taver; the second had a daughter named Bhootaka Natchiar;

¹ The Shivaganga Case, 9 M.I.A. 539.

the third had two daughters Kota Natchiar, and Katima Natchiar; and the fourth was childless. Oya Taver, the brother, left three sons, of whom the eldest was named Moottoo Vadooga. "The rule of succession to the Zemindari was admitted to be that of the general Hindu Law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject." Their Lordships of the Judicial Committee¹ laid down as incontestable propositions that if the Zemindar at the time of his death, and his nephews were members of an undivided Hindu family, and the Zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, he was separate in estate from his brother's family, the Zemindari ought to have passed to one of his widows, and failing his widows, to a daughter, or descendant of a daughter, preferably to nephews following the course of succession which the law prescribes for separate estates." Gourivallabha's widows and daughters advanced a third question, namely that even if the Zemindar be assumed to be generally undivided in estate with his brother's family, this Zemindari was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters. Upon this view of the law the question whether the family were divided or undivided becomes immaterial and the only material question of the fact would be whether the Zemindari was to be treated as self-acquired separate property of Gourivallabha or not.² The points for decision in this case were marked out by Lord Justice Turner as follows:—

First: Were Gouri Vallabha Taver and his brother Oya Taver, undivided in estate, or had a partition taken place between them?³

¹ Judgment was delivered by Lord Justice Turner.

² Page 589.

³ The case has a complicated previous history. See 9 M.I.A., pp. 590-594.

Second: If they were undivided, was the Zemindari the self-acquired and separate property of Gourivallabha Taver? And if so,

Third: What is the course of succession according to the Hindu Law of the South of India of such an acquisition, where the family is in other respects an undivided family?

The finding was that there was no partition as alleged. But the answer given to the second question was in the affirmative.¹ Their Lordships conceived that that was "the necessary conclusion from the terms of the grant and the circumstances in which it was made." Their Lordships then discussed the rule of succession in cases like this and found that one member of a joint family may have separate property which would descend to his heirs and "according to Hindu law there need not be unity of heirship."

Though the actual decision in the case was given on the finding that the Zemindari was the self-acquired property of Gourivallabha, the rule that their Lordships laid down as the the two incontestable propositions of law deserves our special attention.

Next we shall take up *The Tipperah case*² which was decided in 1869 and the judgment of their Lordships of the Judicial Committee was delivered by the Right Hon. Lord Chelmsford. The family here was governed by the Dayabhaga law. The suit was one in the nature of an ejectment brought by the appellant, the half-brother of the late Rajah of Tipperah, Essanchunder, against the respondent, Beerchunder Thakur, the uterine brother of Essanchunder and against others to recover a very valuable Zemindari, being that part of the Royal possessions

¹ 9 M.I.A., p. 606.

² Neelkrishna Deb Burman *vs.* Beerchunder Thakoor and ors., 12 M. I. A. 523.

of the Rajah of Tipperah which lies within the Indian Territories of the British Crown. The Rajah of Tipperah, though in respect of these lands subject to the laws and Courts of British India, was in fact an independent prince with a considerable territory known as the Tipperah Hills, and as the title to the Zemindary and to the Raj was the same, the dispute respecting the former involved a question of the right of succession to the Musnud or Throne of the independent Principality. The Respondent Beerchunder Thakoor had been acknowledged by the British Government as *de facto* Sovereign of Tipperah, but this acknowledgment had been regarded in the Court below as determining nothing more than his present actual possession of the throne.

After Essanchunder's death, Beerchunder Thakoor claimed and obtained the Throne, his claim being based on his appointment as Jubraj by Essanchunder. The questions to be determined in the case were as follows:—

First, had Essanchunder Manickya the power of appointing Beerchunder Thakoor as Jubraj in preference to the appellants?

Second, did he in fact so appoint Beerchunder Thakoor?

Third, supposing there was no valid appointment of Jubraj, who was entitled to succeed to the Raj and the Zemindary in question? Admittedly the right of succession to both the Raj and the Zemindary is governed not by the general law, but by Koolachar or family custom. There were several previous litigations¹ in the family in which the question as to this custom was much agitated, and those cases established that, according to the custom, the reigning Rajah should name a Jubraj and Burra Thakoor, of whom the first was to succeed to the throne, and the latter to the office of Jubraj. It was however contended

¹ See *Ramgunga Deo vs. Doorgamunee Jubraj*, 1 S. D. A. Refs. 270.
Urjun Manic Thakoor vs. Ramgunga Deo, 2 S. D. A. Rep. 139.
Ranee Soomitra vs. Ramgunga Manick, S. D. A. Rep. 40.

by the appellant that if Essanchunder appointed a Jubraj he was bound to appoint the appellant, partly by the family custom, he being the eldest living member of the class out of which alone a Jubraj could be selected, and partly by the expressed wish of his predecessor. The Respondent contended that the choice of the reigning Rajah, at least within a certain class, was absolutely free and could not in any way be controlled by the wishes of a former Rajah.

The first question which their Lordships decided and which in their opinion was alone sufficient to dispose of the appeal was "assuming that no valid title to the office of the Jubraj had been conferred on the respondent, Beerchunder Thakoor, who shall be heir to Essanchunder?" The plaintiff was senior in years to Beerchunder, but was half-brother of Essanchunder, Beerchunder being Essan's whole brother. By the general Hindu law of the Dayabhaga School Beerchunder would be the heir in preference to his half-brother in an ordinary property. The question is whether this law would apply to impartible estates like the one in dispute?

Their Lordships in course of discussions of this question observed as follows :—"The normal state of every Hindu family is joint. Presumably such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a kingdom exists in one member follows this general law, but it follows it in part only. For the succession to a kingdom is an exception to it from the very nature of the thing, the family may have property distinct from that to which a sole heirship belongs, and may continue joint; still when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership and so to constitute a joint ownership without the common incidents

of co-parcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot in the absence of custom, furnish the rule to ascertain an heir to a property which is solely owned and enjoyed, and *which passes by inheritance to a sole heir.*" After this their Lordships cited the Shivaganga case¹ and quoted from its judgment where the various principles of succession in Hindu law were discussed.²

Thus in the Tipperah case, the Judicial Committee were of opinion that "a Raj inherited and enjoyed by one sole member of a family" would be separate property of the present holder; and in their opinion "it would be to introduce into law a fiction involving also a contradiction, *to call this separate ownership*, though coming by inheritance at once sole and joint ownership and so to constitute a joint ownership without the common incidents of the coparcenership." Their Lordships' opinion in this respect does not in any way seem to have been influenced by the consideration that the family was governed by the Dayabhaga law. The discussion was quite general and their Lordships made it clear by saying "Survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest."

According to this view Impartibility and Single Succession of an estate would admit of no jointness and coparcenary in it and this will be so whether the estate came down from the ancestors or was granted to the holder himself. But the

¹ 9 M. I. A. 539.

² *Ibid* at p. 610.

Shivaganga case clearly contemplated the possibility of ancestral impartible estate where succession would be by survivorship and similar possibility was also contemplated in *Jowala Buksh vs. Dharum Singh*.¹

In the same year *Raja Suraneni Venkata vs. Raja Suraneni Lakshma Vankama Row*,² went from Madras, and the judgment of the Judicial Committee was delivered by Sir James Colville. The Zemindary in this case was found to be partible. But Sir James Colville explained the Shivaganga case in order to clear up some misapprehension. The court below in the present case said, "If it (the Zemindary) was not partible, and the brothers were, as the plaintiff contends, undivided at the brother's death, the widow would according to the decision of the Privy Council in the case of *Katama Natchier vs. the Rajah of Shivaganga* (9 Moore's Indian Appeal 529), be entitled to the whole estate, so that, whether the plaintiff's own view, or that which we have taken here, is correct, the plaintiff is not entitled to succeed in this case." Referring to this passage Sir James Colville said, "Now, that seems to proceed upon a singular misapprehension of the effect of the Shivaganga case. It is immaterial, as I said before, to the decision of this case, because it is admitted that the Zemindary was not impartible; but the Shivaganga case was this: the family was shown to be undivided, but the impartible Zemindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this court was that in that case the Zemindary should follow the course of succession as to separate property, although the family was undivided; but if the Zemindary had been shown to have been an ancestral Zemindary as in this case, the judgment of the Board would no doubt have been the other way."

¹ 10 M.I.A. 511.

² 13 M.I.A. 113.

Certainly the Shivaganga case contemplated the possibility of an impartible estate being the joint family property, the succession to which would under the Mitakshara law be governed by the survivorship rule. It will be noticed that in this respect there was a real conflict between the Shivaganga case and the Tipperah case,—the latter, as we have already noticed, seemed to decide that impartibility meant separate ownership and as such did not admit of jointness and of the application of the rule of survivorship. It may be noticed here that the Tipperah case was decided by a Board consisting of Lord Chelmsford, Sir James Colvile, Sir R. Phillimore and Lord Justice Selooyne. And so Sir James Colvile, who explains the Shivaganga case now was a party to the decision in the Tipperah case. In the next year¹ Sir James Colvile again had occasion to explain the Shivaganga case, and he stuck to his previous view. The occasion arose when the question as to the succession to a Mansubdary Talook held by a joint Hindu family under a grant from the Zemindar came up for decision. By the custom of the family, the Talook was impartible and descendible to a single heir. One of the members of the family took forcible possession of the Talook and refused to pay the Zemindar's revenue. He was ousted from possession by the Zemindar by the aid of another member of the family, whom the Zemindar recognised and put in possession, and afterwards entered into an agreement with him to pay the revenue. The finding was that there was no division of the family. The appellant in this case argued that the estate in question being impartible, *must*, from its very nature, *be taken to be separate estate*, and consequently that, according to the decision in the 'Shivaganga case,' the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. Sir James Colvile said, "The authority

¹ Stree Rajah Yanamula Venkayamah vs. Stree Rajah Yanumula Boochia Venkondra, 13 M.I.A. 383.

invoked, however, affords no ground for this argument. The decision in the 'Shivaganga case' will be found to proceed solely and expressly on the finding of the court, that the zemindary in question was proved to be the self-acquired and separate property of Gowary Vallabha Taver. It assumes that if this had not been so, the decision would have been the other way."....."It is, therefore, clear, that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend, that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India."

It is very unfortunate that on neither of these two occasions notice of their Lordships was drawn to the dictum so clearly expressed in the Tipperah case. There was a clear conflict of dicta and the only way in which we may make an attempt at reconciliation would be to find out some distinctive feature in the fact that in the Tipperah case the question involved the rule of succession to a Raj which was more of the nature of an office than a landed property, while in others the question of succession to extensive landed property was before the Court. Besides in the Shivaganga case there were properties other than the impartible estate to determine the status of the family.

The conflict was brought to the notice of the Court in 1872, in *Maharani Hiranath Koer vs. Baboo Ram Narayan Singh*¹ in which the right of succession to the Raj and zemindari of Ramghur in Chota Nagpur left vacant by the death of Trilokenath, the infant son of the last Maharaja Ramnath Singh Bahadur, was in dispute. The plaintiff alleged in his plaint that the zemindari of Purgunna Ramghur was acquired by the common ancestor, Maharaja Tej Singh Bahadur, after whose death in 1774 it descended to his eldest son Maharaja

Paresnath Singh. In a prior litigation between the members of the family¹ the Court of Sudder Dewany declared the property to be indivisible. The question in the present case was whether a female can succeed to a Raj. Markby, J., who sitting with Jackson, J., heard the appeal at the first instance, *referred to the Shivaganga case as an instance* of a woman succeeding to a Raj and observed that between impartibility and the exclusion of females, there is no connection whatever. The judgment in the appeal under Cl. 15 of the Letters Patent was delivered by Couch, C. J., who pointed out that "it is not upon the impartibility of the estate, but upon the family being undivided, and the law of succession to ancestral undivided property, that the exclusion of females rests." In answer to the contention that the impartibility meant separate property of the holder, his Lordship admitted that the decision in the Tipperah case would really support this contention. But Couch, C. J., preferred to follow the dictum in the Shivaganga case saying, "But in a later case, we find their Lordships adhering to the law laid down in the earlier case." His Lordship admitted that there was a real conflict and the conflict was irreconcilable.² This was in 1872.

In 1875 Chintaman Singh *vs.* Nowlukho Konwar³ went up to the Privy Council and their Lordships of the Judicial Committee referred to and approved of this decision of Chief Justice Couch in Maharani Hiranath Koer's case. It was held that where the family to which ancestral property, held in the peculiar manner of impartibility belongs is subject to the Mitakshara law and the property is not separate, the

Chintaman *vs.* Nowlukho.

¹ Koonwar Boodh Singh *vs.* Seonath Singh, 2 Sel. Rep. 92.

² 9 B. L. R., p. 324.

³ 1 Cal. 153=21 A. 264=24 W.R. 255.

(See the High Court decision in 20 W.R. 247).

succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder. It was further held that the fact that an estate is impartible does not imply that it is separate, and so to be governed by the law applicable to separate succession. Whether the general status of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another course of succession.¹ In 1878 in Sivagnana Tevar and another

¹ In view of the actual facts of the case however this was merely an obiter.

It will be found from the facts as reported in H. C. Judgment that the decision of this case turned upon one and only one thing, *e.g.*, as to the existence of a custom "which operates to prevent all females from taking and enjoying any portion of the family *property, even to the extent of creating an inability to take that which was the separate property of her deceased husband.*"

(20 W. R., p. 248, para. 3, col. 1, for pleadings.)

The subject-matter of dispute was (1) the Talook Gangore, and impartible estate and (2) some other property left by the last incumbent, Runjeet Singh.

The Subordinate Judge found that with regard to property No. 1 the plaintiff had made out his title to succeed to it under *the family custom as expressed in the deeds of 1832, i.e.*, the custom excluding females from succession. As to property No. 2 he held that it was not governed by the said customs, that the family was divided and that it devolved under the ordinary law of succession on the widow.

(1 Cal., p. 155, 2nd para., and 20 W. R., p. 251, Cal. 1, 3rd para.)

Taksimnama, *see* 20 W. R., p. 250.

The widow appealed as against (1). No cross-appeal by plaintiff. *Re* (2), *i.e.* the finding of separation, it was not challenged.

The H. C. wholly dismissed the suit on the ground that,—

(1) The custom as alleged was vague and indefinite (20 W.R.P. 248, para. 3), that it was never a custom in derogation of the law but merely a usage of the family (p. 250, Cal. 1, para. 5).

(2) That there was certainly no evidence in this case tending to establish any custom of the kind (p. 248, para. 3) and that "in as much

as the custom restrictive of the widow's right to succeed her husband, has not been made out by the evidence in this case, it follows that the plaintiff fails to make out his right to Gangore." (20 W.R., p. 251, 2nd para.)

(3) That the custom of female exclusion not having been proved, succession depended as to *whether there was separation or not* (p. 248, Cal. 2, top).

(4) That "in view of the peculiar circumstances affecting the relations between collateral members of such a joint family as this, with the member who is in actual possession of the impartible property, the courts of justice when called upon to consider a question such as that which is before us, *ought to be satisfied upon comparatively slight evidence that a separation had actually taken place.*"

(5) And that, separation being proved Gangore as well as Purmes-surpore property was the separate *property of Runjeet Singh* when he died and devolved upon his widow, the defendant.

Thereupon Chintaman appealed to the Privy Council.

The Privy Council (1 Cal. 153)—

(1) agreed with the decision of the Subordinate Judge as to the construction of the family custom as set out in the deeds of 1832 (p. 162, top) and held that

(2) the Taksimnamas of 1832 indicated "what the family understood to be the custom" (p. 159, bottom) and that "the real effect of that definition of the custom was that the property was ancestral property, as it was held by a special custom by one person at a time, according to the rule of primogeniture, *with a provision that where the direct male line failed it should then go over to the collateral lines*" and that (p. 162, 1 Cal.)

(3) "the partition which took place in 1832 of the other property cannot be held to have affected the character or the mode of descent of this property as thus defined." (P. 162.)

Consistently with this finding, their Lordships did not much enter into the question of separation though they found "that there has been to some extent a separation of this family" (p. 161). The question of jointness or separation was immaterial because even though there was separation, the collateral members possessed *a further right under the custom and in derogation of the law*, e.g., "*when the direct male line failed, it should then go over to the collateral lines*;" in other words, a right to succeed by virtue of the custom of female exclusion,

vs. Peria Sam¹ a question relating to the Poliam of Padamattur, an impartible Zemindary descendible by inheritance according to the custom of primogeniture, went up to the Judicial Committee for decision. The Poliam having passed on the death of their father to the eldest of the three undivided Hindu brothers, the eldest brother executed, in 1829, an instrument appointing his second brother to be zemindar of the Poliam; this second brother died in 1835 and was succeeded by his only son Dhorai Pandiam, who died in 1861, leaving a widow but no son. S, a son of the eldest brother above referred to instituted a suit in 1837 to recover certain villages belonging to the Poliam Zemindary from defendants in possession and claiming as purchasers for value from D. Sir James Colville delivered the judgment of the Judicial Committee in course of which he said, "It may be desirable, before their Lordships approached the direct question to be decided, briefly to recapitulate some of the facts relating to his estate. Oiya Tevar, the then Zemindar of Padamattur, died in 1815. He was succeeded by his eldest son Muttu Vaduga. That person had two brothers, and therefore, whether Oiya Taver were previously joint with his brother Gouri Vallabha, the Istimirar Zemindar of Shivaganga, in respect of Padamattur or not, the latter estate must be taken to have descended to Muttu Vaduga as ancestral estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a Raj or other impartible estate descendible to a single heir. Hence there can be no

Then their Lordships on a true construction of the deeds of 1832 and the compromise of the suit of 1852, came to the conclusion that the effect of those acts did not amount to a waiver of this right under the custom, i.e., the right to succeed even though separate.

¹ I.L.R. 1 Mad. 312=5 I.A. 61=2 C.L.R. 81.

doubt that the estate though impartible was, up to the year 1829, in a sense, the joint property of the joint family of the three brothers." In this case also Sir J. Colville clearly indicated the possibility of the impartible estate being joint family property and approved of the decision in the Shivaganga case.

In the same year Sir B. Peacock who delivered the judgment in *Doorga Persad Singh vs. Doorga Konwari*,¹ intimated that "the impartibility of the property does not destroy its nature as joint family property or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. The rule upon this subject was stated in the Shivaganga case." The dictum in the Shivaganga case was thus again confirmed by the Judicial Committee.

It would be better to notice one passage in this judgment which says : " In the present case there are other members of the joint family nearer in degree to the deceased Gurbh Narain than the present plaintiff and who, in the absence of family custom, might be entitled under the ordinary Mitakshara law to succeed to the estate, assuming it to be joint family property." I refer to this passage only to show that it was not yet thought of by the courts of Law to apply the rule of primogeniture in collateral succession by survivorship. *Raja Ram Narayan vs. Partum*,² was decided by the High Court of Calcutta in 1873, the suit being for khas possession of Ruttonpore and other mauzas in pergunna Gundhose after setting aside certain alienations made by Rajah Mahendranath Singh, father of the plaintiff, on the ground that, according to the Mitakshara law and the custom of primogeniture which was prevalent in the family, the plaintiff's father had no right to alienate, and that

¹ I.L.R. 4 Cal. 190 (P.C.). Sir J. Colville was also present—59 A. 149=3 C.L.R. 31.

² 11 B. L. R. 397. (Phear and Ainslie, JJ.)

therefore the plaintiff, as the eldest son and born during the life-time of his father, was entitled to recover possession. It was found in the case that "the property in question had descended to the plaintiff's father from his father and so it was in his hand an ancestral property as distinguished from a self-acquired property; and its incidents and the rules which would govern its descent, would therefore be those prescribed by the general law of the land in that part of the country, namely, by the Mitakshara law, excepting so far as that might be controlled or overridden by the operation of an established custom or other special authority. And in the absence of any such exceptional disturbing force, one of the incidents of ancestral property in the hands of the father would be that he would have no power of alienation or of encumbering as against any members of the family, who were joint with him in respect of his property."

I shall here mention one case which has gained much notoriety through an error of Lord Macnaghten. I mean the case of *Naraganti Achammagru vs. Nayanivaru*,¹ decided by the Madras High Court in 1881 in which it was stated: "Where property is held in coparcenary by a joint Hindu family, there are ordinarily three rights vested in coparcenary—the right of joint enjoyment, the right to call for partition and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition as the right of an undivided coparcener, are from the nature of the property incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that right remains." Their Lordships of the Madras High Court who heard this appeal referred to the Tipperah case and observed that "the ruling therein given appeared to be in conflict with rulings of the same eminent tribunal in cases that have arisen

¹ I. L. R., 4 Mad. 250 (Sir Charles Turner, Kt., Chief Justice and Mr. Justice Muthusami Ayyar).

in the Presidency and which we are unable to reconcile with the ordinary law of Southern India and Benares respecting impartible property of a joint family." They further observed as to the nature of the impartible estate that "separate possession but not separate ownership is the characteristic of the property, which although impartible, is *ex hypothesi* joint. Co-ownership, which is the cause of survivorship, was held not to exist in the case of the Tipperah Raj. We could have hesitated to express an opinion at variance with that ruling, if we could find no support for our views in a ruling which is equally imperative on us, and from which, in the Tipperah case, their Lordships had no intention to dissent." The Shivaganga case was then cited in support.

In this case it was further held that "when impartible property passes by survivorship from one line to another it devolves not necessarily on the coparcener nearest in blood, but on the nearest coparcener of the senior line. Texts which recognize the right of primogeniture recognize also the superior right of brethren in the order of seniority—Mitakshara, 183." Here was then a clear pronouncement, though not by the Judicial Committee, that though partition could not be demanded that would not exclude the possibility of coparcenary in the estate. Then in 1884 *Rajah Rup Singh vs. Rani Baisini*¹ went up to the Judicial Committee and it was again declared that "an ancestral estate, even though impartible, is not the separate or self-acquired estate of the single members upon which it devolves, so long as the family continues joint." The judgment of Sir Richard Couch in the case of *Maharani Hiramath Koer vs. Ram Narayan Singh* was approved of and *Chintamun Singh vs. Nowlukho Konwari*² was declared as correctly decided and a binding authority. The Shivaganga case as well as the Perisami case was also cited with approval.

¹ 7 All. 1=11 I. A. 149.

² 2 I. A. 263=1 Cal. 153.

So, with the exception of the Tipperah case, coparcenary in the impartible estate was not deemed impossible, and as we have already noticed such coparcenary is not juristically inconsistent with impartibility. It is said that from its very nature a judge-made law cannot override any established principle of judge-made law.¹ It seems to have been declared as an well-established principle by several successive decisions that coparcenary in impartible property is not an impossibility and we shall next see how this view was discarded by later decisions of the same Board.

Sartaj Kuari *vs.* Deoraj Kuari² marks the beginning of the second stage in the history of the subject.

Sartaj Kuari's case.

The case came up for decision before a Board consisting of Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock and Sir R. Couch in 1888 and the judgment of the Committee was delivered by Sir R. Couch, the Judge who decided Maharani Hiranath Koer's case in 1872. The question in the appeal was whether a gift of seventeen villages made by the appellant Rajah Bhawani Ghulam Pal on the 18th February, 1887, to the appellant, Rani Sartaj Kuari, his younger wife, was valid. Plaintiff was Bhawani Ghulam's son by another wife, Lal Narindar Bahadur Pal, minor, through his mother and guardian. The villages in question formed part of the hereditary and impartible Raj estate in the possession of the Raj of Mahauli and plaintiff's claim was based on the ground that, by Hindu Law and usage, the Rajah had no power to alienate any part of the Raj estate.

The estates, which were considerable, lay in the parganas of Tanda and Akbarpur, Fyzabad, in the Province of Oudh, and Mahauli and Rasalpur in the district of Basti, in the North Western provinces. Some 300 years ago two brothers, named Alakdeo and Tilakdeo, Surajbansi Rajputs, coming as they

¹ Dicey, *Law and Public Opinion*, p. 486.

² 10 All. 272 (P. C.) 151. A. 51.

alleged from Kumaun, invaded the locality in which the property is situated, and killing one Kaulbil, the then Rajbhar, appropriated his lands and made them the nucleus of the present Raj. Subsequently for services rendered or for some other reason, they obtained from one of the Delhi emperors the title of 'Pal' which has now for a long course of years been attached to the family. Admittedly the Raj or estate was impartible and subject to the rule of succession by primogeniture. The family was governed by the Mitakshara law.

In this state of affairs High Court held that in the absence of any custom to the contrary, the plaintiff and his father being Hindus and members of a joint Hindu family, and as such subject to the law of Mitakshara, the estate pertaining to the Raj of Mahauli must be regarded as joint family property in which he had an immediate interest and a right of succession as eldest son. The father therefore had no absolute disposing power over an estate which had some of the incidents at least of joint property.

The Judicial Committee observed: "if there were no family custom, the Raja's power over the estate would be governed by this law, and the gift in question would be valid. But as was said by this Committee in the Tipperah case, 12 M. I. A. 542 'where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.' It is admitted that the Raj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of Mitakshara is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty."

The judgment then goes on: "The Judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Raja or Zemindar, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be

considered as the joint property of the family. The saying in the Shivaganga case 'the Zemindary though impartible, was part of the common family property' must be understood with reference to the question which was then before their Lordships. The question of the right of an eldest son or other son to control the father did not arise in that case." Their Lordships then reviewed *Raja Yanumula Venkalyamah vs. Raja Yanumula Bochia* ¹ and found a clear expression of opinion that, though an impartible estate may be for some purposes *spoken of* as joint family property, the coparcenary in it which under the Mitakshara law is created by birth does not exist. The passage which their Lordships quoted runs as follows: "These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate in favour of the junior members of the family, who *but for the impartibility of the estate would be coparceners with him.*"

Their Lordships then relied on *Baboo Beer Pertab Sahee vs. Maharaja Rajendra Pertab Sahee* ² in which the Judicial Committee upheld the exercise of testamentary power by the holder of an impartible Raj, saying that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth and '*cessante ratione legis cessat et ipsa lex.*' Then their Lordships proceeded to observe: "The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons: 'Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common.'"³

¹ 13 M. I. A. 333.

² 12 M.I.A. 1 (The Hunsapore case).

³ Mitakshara, Ch. I, S. J. V. 30.

The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so unconnected with the right to a partition that it does not exist where there is no right to it. "In the Hunsapore case there was right to have Babuana allowance as there is in this case; but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership, which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed."

Their Lordships thus make an attempt at reconciliation of their own pronouncement with all previous pronouncements made by the same Board. In saying that coparcenary in impartible estate cannot exist they really override the principle of many prior decisions. Yet their Lordships thought they were only limiting the operation of the rule laid down by such previous decisions. If coparcenary would exist in such estates it would exist only for the purpose of succession, and their Lordships refused to carry the rule further than that.

Seven years before Sartaj Kuari's case Udday Adittya Dev *vs.* Jadublal Aditya Dev¹ went up to the Privy Council in which a question relating to the

The Patkoom case.

power of alienation of the present holder of the impartible Zemindari of Patkoom was raised and decided by the High Court of Calcutta in 1879; the extreme contention of the plaintiff was that the impartibility of the estate deprived the present holder of the power given to a father under the Dayabhaga

¹ 8 Cal. 199 (P.C.)=8, I.A. 248 (The High Court decision is reported in 5 Cal. 113).

22 Mad. 383=26 I.A. 83.

law to alienate the estate at his will. The contention was overruled, it being held that the mere fact of the impartibility of an estate, or rather the mere fact that the succession to a Zemindari is governed by the law of primogeniture, does not deprive the Zemindar of his ordinary right to alienate it, or any portion of it, during his lifetime.

There could have been no question of any co-ownership in this case, it being one under the Dayabhaga law. But the principle laid down here was quite in keeping with that given effect to in cases prior to Sartaj Kuari's case.

Sri Raja Rao Venkata Surya Mahipati Ram Krishna Rao Bahadur *vs.* the Court of Wards, etc.—the First Pittapur case, decided in 1899—is the next case of importance. The suit was brought by the adopted son of the late Raja of Pittapur against the Court of Wards and the second respondent who is the minor son of the late Raja. The plaint stated that the second respondent was not the son of the late Raja or his wife ; it also disputed his title to succeed under any will left by the late Raja and alleged that a will said to have been made by him in favour of that defendant as his natural-born son contravened the contract made at adoption ; that the will was void by law and custom and that the properties dealt with by it were inalienable and could not pass by it. The really important question in the appeal was whether the Raja had power to alienate the impartible estate. Mayne in course of his argument referred to several early decisions¹ of the High Court of

¹ Rajah Ennoguntty Sooriah *vs.* Rajah Vencata Nealadry Rao, 3 Knapp 1822, 27 note.

Viswasu Ramaya *vs.* Vahidally Beg, Mad. Dec. (Sud. Ad.) (1849) 51.

Sree Sree Ramachandra Sur Harishendana *vs.* Jaganada Gajapati (1861), Mad. Dec. (Sud. Ad.) 162.

Subbarayulu Nayak *vs.* Rama Reddi (1862), 1 M.H.C.R. 141.

Malavaraya Nayanar *vs.* Oppayi Ammal, 1 M.H.C.R. 349.

Madras and urged that there was a custom co-extensive with the province of Madras with regard to every impartible Zemindari, that a course of decisions had established a custom,—a long series of decisions not resting upon the Mitakshara law. Their Lordships after a review of the cases referred to and of the case of *Ramalakshmi Ammal vs. Sivanantha Perummal*¹ overruled the contention and held that the alleged custom did not modify the law and had no force independently of the law. Their Lordships followed the principle laid down in *Sartaj Kuari's* case and upheld the power of alienation by will.

Though out of the chronological order we would better notice the Second Pittapur case² in this connection. It was a case decided by the Judicial Committee in 1918 and the judgment was delivered by Lord Dunedin. The appellant filed the suit against the Raja of Pittapur claiming maintenance on the ground that the Raj was the joint family property of himself, his father and the late Raja. The contention of the other side was that the plaintiff's claim to maintenance not being based on any family custom nor on any special text of the Mitakshara, but on the theory that an impartible Raj is the property of the coparcenary, is not tenable after the decision of *Rani Sartaj*

Narayana Devu vs. Harischendana Devu, 1 M.H.C.R. 455.
Chintalapati Chinna Simhadriraj vs. Zemindar of Vizianagram, 2 Mad. H.C.R. 128.

Syed Ali Sahib vs. Zemindar of Salur, 3 M.H.C.R. 5.
Muttu Virancheti vs. Rani Kattama Natchiyar, 4 M.H.C.R. 463.
Gavuride Vamna Garu vs. Ramandora Garu, 6 M.H.C.R. 93.
Pareyasami vs. Saluckai Tevar, 8 M.H.C.R. 157.
Beresford vs. Rama Subha, 13 Mad. 197.

¹ 14 M.I.A. 570.

² *Rajah Ram Rao vs. Rajah of Pittapur*, 28 C.L.J. 428 (P.C.) = 45 I.A. 148 = 23 C.W.N. 173 (P.C.).

Board consisting of Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Kuari's case. Their Lordships observed: "It is beyond doubt that the decisions in the Madras Courts prior to the case of Rani Sartaj Kuari *vs.* Rani Deoraj Kuari embodied the theory that there was joint property in an impartible Zemindari, which only fell short of coparcenary because by custom partition was inadmissible. It is needless to cite or examine authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct" But the decision of the Board *which binds their Lordships made that view no longer tenable.* It settled that in an impartible Zemindari there is no coparcenary, and consequently no person existed who as coparcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very Raj in the Pittapur case. The import of these decisions was in their Lordships' view, correctly stated by Sir L. Jenkins in the case of Bachoo *vs.* Mankorebai: ¹ "It has now been definitely decided that in impartible properties there is no coparcenary."

The case of Bachoo Harkison Das *vs.* Mankorebai above referred to was decided by the High Court of Bombay in 1904 and in it the question was whether the adoption made by the widow of a deceased coparcener in a joint family under an authority to adopt given to her by her husband's will was valid when, prior to such adoption, a posthumous son was born to the other co-parcener. There the property was not an impartible one; but as cases ² relating to such estates were referred to

¹ 29 Bom. 51.

² Sri Raghunadha *vs.* Sri Brozo Kishore (1876), 3 I.A., 154 = 1 Mad. 69.
Surendranandan *vs.* Sailaja Kant, 18 Cal. 385.

Naragunty *vs.* Vengama, 9 M.I.A. 66.

The Shivagunga case, 9 M.I.A. 543.

The Tipperah case, 12 M.I.A. 523.

Stree Rajah Yanumulu *vs.* Stree Rajah Boochia, 13 M.I.A. 333.

Chowdhery Chintamoni *vs.* Nowlukho, 11 I.A. 63.

Sir James Colville was party in all these cases.

their Lordships had to dispose of those cases with the remark quoted above.

The case that we are now going to notice simply followed these second series of decisions and in a way closes the chain. I mean the case of *The Bettiah Raj case*. Raj Kumar Basu Bishun Prakash *vs.* Maharani Jankikoer¹ which was a case in which the appellant claimed the Bettiah Raj basing his title upon the view that his branch of the family was joint with the family of the late Raja; and accordingly became entitled, upon the death of the last Raja without male issue, to succeed by the rule of coparcenary to the estate. Viscount Cave in delivering judgment observed: "It is admitted that the Bettiah Raj is impartible, and it was decided in two cases before this Board, namely, in the case of Rani Sartaj Kuari *vs.* Rani Deoraj Kuari and again in the case of Raja Ram Rao *vs.* Raja of Pittapur that an impartible Zemindari is the creature of custom, and it is of its essence that coparcenary in it does not exist. It follows from those decisions that, even on the appellant's view of the facts he cannot succeed in this appeal." In arriving at this conclusion their Lordships thought it unnecessary to call on the Counsel for the respondents in the case, as the appellant "was faced from the beginning with a difficulty which he had not been able to surmount." The difficulty referred to was the two cases cited in the judgment.

I shall next refer you to a few cases of this second period where the old principle of coparcenary was followed, and I shall first name Kachi Kaliyana *vs.* Kachi Yuva. Kaliyana Rengappa Kalakka Thola Udayar *vs.* Kachi Yuva Rangappa Kalakka Thola Udayar.² In 1905

¹ 24 C.W.N. 857 (P.C.), 1920.

² 2 C. L. J. 231 (P.C.) = 32 I. A. 261.

Lord Macnaghten delivered judgment in this case and his judgment was passed on an error that the decision in *Naraganti vs. Venkatachalapati*¹ was a decision of the Judicial Committee. The litigation related to the title to a Zemindari known as the Zemindari of Udayarpalayam. The principal question raised was whether the Zemindari was partible or impartible. A further question was raised, namely that the appellant would be preferable heir even assuming the Zemindari to be an impartible one. Lord Macnaghten disposed of this question saying: "The first of these two questions² is concluded by authority. It is settled in accordance with a *ruling of this Board* that when impartible property passed by survivorship from one line to another, it devolves not on the coparcener nearest in blood, but on the nearest co-parcener of the senior line—a position held by the principal respondent in *Naraganti vs. Venkatachalapati*."

So Lord Macnaghten was clearly in error and his error greatly influenced his judgment on the point. In fact he gave no judgment on it as he thought it was concluded by authority while as a matter of fact it was not.

Raja Jogendra Bhupati Hurrochandra Mahapatra *vs.* Nityananda Man Singh³ went up to the Judicial Committee for decision in which Sir R. Couch in delivering the judgment of the Judicial Committee remarked: "Now it may be well first to dispose of a point arising out of the fact that this is an impartible Raj, which it is admitted to be. According to the decision in the Shivaganga case which, as their Lordships understand, is not now disputed, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Rajah,

¹ 4 Mad. 250.

² Meaning the last question given above.

³ 18 Cal., 151 (P.C.)=17 I. A. 128.

the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is what would be the right of succession, supposing instead of being an impartible estate it were a partible one." This was in 1890.

In 1896 in *Muttuvaduganadha Tevar vs. Periasami Tevar*,¹ Lord Hobhouse delivered the judgment of the Committee of which Lord Davey and Sir R. Couch were also the members. The appeal was dismissed with these remarks: "Their Lordships do not discuss the question of survivorship, because Mr. Cozens Hardy distinctly stated that he rests his claim not on survivorship between the plaintiffs and Dhorja Singa, but on the plaintiff's greater proximity to the true root of title. But on both points they express their agreement with the learned Hindu Lawyers,² who presided at the hearing of this case in the High Court." The judgment of the High Court of Madras which was thus affirmed by the Judicial Committee decided several points of which decisions on the first, third and fourth issues raised in the case are important for our purpose.³ The fourth issue related to the nature of the interest which the holder of an impartible estate had in it. It was contended that such interest was only a qualified one and consisted only in the right of management subject to appellant's right to succeed to him on his death. This contention was overruled by the High Court saying that the holder was owner and not a mere manager. One other point was decided in this case which deserves our notice. In disposing of the fifth issue it was said, "It is sufficient to state that nearness or remoteness of relationship to the Istimarrar Zemindar is perfectly immaterial. As observed by the Privy Council

¹ 19 Mad., 451 (P.C.) = 23 I. A. 128.

² Meaning Muttusami Ayyar J.

³ See 16 Mad. 18

in *Neel Krishto vs. Beer Chunder*¹ and by this Court in *Naraganti Achama vs. Venkata Chalapati*² it is the nearest in blood to the last male holder that is the proper heir, and not the senior member of the whole group of agnates." Then in the next year *Sri Raja Lakshmi vs. Sri Raja Surya*³ was decided by the Judicial Committee and Lord Davey in delivering judgment observed, "It will however be found that as between the appellant and respondent the question whether the zemindari is partible or not is of no importance. Even if impartible it may still be part of the common family property and descendible as such. The real question therefore is whether it has ceased to be part of the joint property of the family of the zemindar."

The Bettiah Raj case⁴ is sometimes cited for the purpose but it does not decide any such thing as will appear from the judgment. On the accession of the East India Company to the Government of Bengal, Raja Jugal Kishore who then held under a zemindari the estates now known as the Bettiah Raj, together with two other pergannahs, Mailsi and Babra, offered resistance to the Company's officers. Subsequently for the better management of the estate the Government decided to reinstate the Raja and to settle the rest on the predecessors of the appellant. When these arrangements were finally concluded about 1790 A.D. the Raja had died and had been succeeded by his son Bir Kishore Singh. On these facts it was held in this case that the re-instatement of Raja Jugal Kishore's heirs to a portion of his father's estate was a direct exercise of sovereign authority and proceeded from grace and favour. It was there-

¹ 12 M. I. A. 523.

² 4 Mad. 250.

³ (1897) 20 Mad. 256 (P. C.)=24 I. A. 218.

⁴ 29 Cal. 828 : *Ram Nandan Singh vs. Janki Koer*. This was decided in 1902=29 I. A. 178=7 C. W.N. 57 (P. C.).

fore the self-acquired property of Bir Kishore Singh, though with all the incidents of the family tenure of the old estate as an impartible Raj.

Next we shall look to *Parbati Kunwar vs. Chandarpal Kunwar*,¹ which was a case under the Oudh Estates Act and was decided in 1909. Lord Collins in his judgment quoted with approval a judgment of the High Court of Madras² which ran as follows: "The first of them (*i.e.*, the first principle) is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law.....We have first to ascertain the class.....and we have next to select the single heir applying the special rule." This was quoted by way of reply to the contention that evidence of a custom regulating succession to impartible estates, such as Rajs where the rule of gaddinashin prevailed, was altogether inadmissible on a question as to the custom of succession to a partible estate governed by the ordinary Hindu Law applicable to estates in list IV.

*Thakurani Tara Kumari vs. Chaturbhuj Narayan Singh*³ was decided by the Judicial Committee in 1915 and Sir John Edge in delivering the judgment found it as well decided law that the widow of the last holder of an impartible estate which descended by the rule of primogeniture was not excluded from the succession if her husband was in fact separated and died without issue male and if no custom which would exclude her

¹ 10 C. L. J. 216=36 L. A. 125.

² 17 Mad. 316 at page 325.

³ 19 C. W. N. 1119 (P. C.)=42 L. A. 192=42 Cal. 1179.

from the succession was strictly proved. He further held that persons living jointly with the holder for the time being of an impartible estate had no coparcenary rights in it and no rights which would entitle them to a partition of an impartible estate, and that the holder by alienating the estate could determine any contingent interest that members of the joint family might have in it under the custom of Primogeniture.

We shall have occasion to refer to this case again when discussing the question as to what would constitute separation in such a family. Here it would be sufficient to mention that this case clearly contemplates the possibility of coparcenary in impartible estates.

Similarly in *Srimati Rani Parbati Kumari Devi vs. Jagdish Chunder Dhabal*¹ which was decided in 1901

Dhablum case.

it was held on the evidence that the family though located in Bengal was governed by the Mitakshara law and that under the Mitakshara law, *the ancestral estate of a childless person* passes, at his death, to his brother to the exclusion of his widow. So a coparcenary was recognized in such an estate. It was also decided that property purchased by a Zemindar, or by the Court of Wards on his behalf during minority from savings of an impartible ancestral Raj is to be regarded as his self-acquired property, unless an intention appears on his part to deal with it as a part of the Raj.²

When such was the state of the law, *Baijnath Prashad vs. Tejbali*³ went up to the Privy Council and *Baijnath vs. Tejbali* was decided by the Judicial Committee in 1921. The decision has provoked a great deal of criticism.

¹ 6 C. W. N. 490 (P. C.)=29 I. A. 82=29 Cal. 433.

² The last point once again came up for decision in *Rani Jagadamba vs. Wazir Narayan Singh* and the decision was to the same effect. See 28 C. W. N. 98 (P. C.)=50 I. A. 1.

³ 33 C. L. J. 388 (P. C.)=48 I. A. 195=43 A. 228. (Board consisting of Lord Dunedin, Lord Phillimore, Md. Ameer Ali and Sir Lawrence Jenkins).

Judgment of the Committee, was delivered by Lord Dunedin who after a review of all the previous cases summed up as follows: "It will be apparent from this long series of authorities that there are under the Mitakshara law only two possible lines of devolution and that the only test to be applied is, was there community or was there separation? The argument of the appellants would involve there being two tests, (1) Was the property joint or separate? and (2) If it was joint, was it an impartible raj? If this were right, there would have been no enquiry in the Shivagunga case whether the raj was self-acquired property or not. It would have been enough to take the admission that it was an impartible raj. The appellant's argument, therefore, is entirely based on what was said in the case of Sartaj Kuari and the second Pittapur case which followed it."

"Now if the whole subject were open it would probably have been better if the words 'coparcenary' and 'coparceners' had not been used.....It is necessary not to fasten the attention on the word 'Coparcenary' but rather to enquire what actually was decided in the case of Sartaj Kuari. Now what was decided was that in an impartible raj there was no restriction on the power of alienation by the member of the family who was on the Gaddi and was in possession, in respect of that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance each member might have of a succession emerging in his favour was obviously outside the sphere of enquiry."

Then their Lordships quoted from Sartaj Kuari's case where it approved and affirmed the general proposition laid down in the Tipperah case to the effect "When a custom is found to exist, it supersedes the general law, which however, still regulates all beyond the custom" and observed that this was the keynote of the position.

Their Lordships then observed, "The question how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited, and there is, in their Lordships' view, no necessary logical deduction from the decisions in the Sartaj Kuari and the second Pittapur cases which forces them to an opposite conclusion."

Professor Sarvadhikary has found fault with this decision¹ and I can do no better than quote Sarvadhikary's criticism of Tej Bali case. Professor Sarvadhikary² says:

"Lord Dunedin in delivering the judgment in the case of Baijnath *vs.* Tej Bali makes an exhaustive survey of the cases bearing upon the question and points out that even in cases subsequent to that of Sartaj Kuari,³ 'which introduced a new line of thought' there are observations of Sir R. Couch himself, of Lord Davey and others showing that ancestral impartible estate in joint Mitakshara families was held to devolve by survivorship. That is so no doubt; but those observations as well as the decisions in the previous cases were based on the assumption that ancestral impartible estate was joint family property and the same rules, which govern succession to partible estates would govern succession to impartible estates. We have shown there is no foundation for such an assumption. In the next place, Lord Dunedin distinguishes Sartaj Kuari's case, and the Pittapur case,⁴ as cases where only the presently existing right of the other members was considered and 'the chance each member might have of succession emerging in favour was obviously outside the sphere of enquiry.' Now if those cases decided that the other

¹ 33 C. L. J. 388 (P.C.)=48 I. A. 195.

² T. L. L. (Second Edition), pp. 768-770.

³ 10 All. 272 (P.C.)=15 I.A. 51.

⁴ First Pittapur case—22 Mad. 383=3 C. W. N. 415 (P.C.).

Second Pittapur case—23 C. W. N. 173 (P.C.)=41 Mad. 778=45 I.A. 248.

members had no present right to an ancestral impartible estate, and the decisions so far are not impeached, it is clear such property must fall within the category of *Sapratibandha daya* or obstructed heritage according to the classification of *Vijñāneśwara* and its devolution will be by the general law of inheritance to separate property and not by the rule of survivorship. 'The chance of succession' will depend on the general rule of nearness of kin. Lastly his Lordship refers to the proposition laid down in the *Tipperah case*¹ that 'when custom is found to exist, it supersedes the general law, which however still regulates all beyond the custom,' and observes: 'This is the keynote of the position. The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited and there is in their Lordship's view, no necessary logical deduction from the decisions in the *Sartaj Kuari* and the second *Pittapur* cases which force to an opposite conclusion.' In the first place, unless the property is joint no question of the selection of the head or *Kartā* can arise, nor is there any general law in regard to such selection. Nowhere is it shown why ancestral impartible estate is to be regarded as joint family property, while the contrary follows from the decisions in *Sartaj Kuari* and the *Pittapur* cases. Those cases established the proposition that the son, and therefore other members as well, acquire no interest by birth or, to quote the words of Lord Dunedin, 'no other member has a presently existing right.' If that be so, it is clearly separate property to which the general law of succession should apply. The selection of the head of a joint family has nothing to do with the succession to obstructed heritage. The decision of the Judicial Committee in the second *Betia case*—*Raj Kumar Bishen Prakash vs. Maharani Janki Kuar*,—even if 'based on an admission by the learned counsel for the appellant that the

¹ 12 M.L.A. 532 (542).

question is concluded by the *Šartaj Kuari's* and the second *Pittapur cases* appears to have taken the correct view, and it is unfortunate that the Judicial Committee should again have unsettled the law by its decision in the case of *Baijnath vs. Tej Bali*."

So far as the *Baijnath vs. Tej Bali* applies the rule of lineal primogeniture to collateral succession Professor Sarvadhikary says,¹ "In the recent case of *Baijnath vs. Tej Bali* the Judicial Committee has not only held that in such a case succession is to devolve by survivorship, but following the observation of Lord Macnaghten in the case of *Kachi Kalyana vs. Kachi Yupa*² it has also held that the heir is to be determined from amongst the coparceners by the rule of lineal primogeniture. Lord Macnaghten in that case, mistaking a decision of the Madras High Court³ for that of the Privy Council, observed: 'It is settled in accordance with a ruling of this Board that when impartible property passes by survivorship from one line to another, it devolves not on the coparcener nearest in blood, but on the nearest coparcener of the senior line.' Devolution by the rule of lineal primogeniture in ancestral impartible estate was thus first stated in the Madras case and reiterated in *Kachi Kalyan's* case. Both those cases related to impartible estates known as Polayams or Polliams in Southern India in which, for aught we know, the special custom may be to that effect. Now, it is a well established doctrine first laid down in the *Tipperah* case and re-asserted subsequently in several cases by the Judicial Committee that 'when a custom is found to exist, it supercedes the general law, which however, still regulates all beyond the custom.' The general law is that embodied in the text of Manu. 'To the nearest Sapinda inheritance next belongs.' Therefore in the case of an ancestral impartible estate in a joint

¹ T. L. L. (Second Edition), pp. 761-62.

² 32 I. A. 261 = 2 C. L. J. 231 (P. C.) = 10 C. W. N. 95.

³ *Naraganti vs. Nayanivaru*, 4 Mad. 250.

Mitakshra family even if it devolves by survivorship—a point which we will discuss presently—the eldest amongst those coparceners who are nearest in degree is the heir. In other words, the heir is to be determined by the rule of ordinary primogeniture and not of lineal primogeniture as laid down by the Judicial Committee in the recent case of Baijnath *vs.* Tej Bali. One who sets up devolution by the rule of lineal primogeniture sets up something which is outside the general law and the onus would be on him to prove it as special family custom. The English rule of primogeniture has nothing to do with the Hindu law.”

In order to appreciate this learned criticism it becomes necessary for us to point out the net result of all these decisions which is still law not being over-ruled by Baijnath *vs.* Tej Bali.

1. Impartibility and rule of succession by primogeniture are creatures of custom.¹

2. Such custom, when found to exist, supersedes the general law which however still regulates all beyond the custom.²

3. Impartible estate may be the joint family property of a Mitakshara family.³

4. The present holder of the estate, whether it descends to him from his ancestors or is acquired by himself can alienate it as his own absolute property (a) by any transfer *inter-vivos*⁴ or (b) by will.⁵

Even though such holder is a member of a joint Mitakshara family to which the estate belongs, no other member has

¹ See Chapter IX.

² See the Tipperah case 12 M. I. A. 532 approved by Tej Bali case in this respect.

³ The Shivaganga case and others.

⁴ Sartaj Kuari's case.

⁵ The Hansapur case.

any right to restrain or question such transfer either during the life-time of the present holder or after his death.

5. No other member of the family has any presently existing right to the property.¹

6. No other member takes any interest in the property by birth.²

7. Other members of the family have a mere chance of succession to the estate.³

We have already observed that there was nothing in the nature of an impartible estate which was inconsistent with the existence of co-ownership in it. But surely if co-ownership in it is deemed possible, the present holder's power of disposal will be very limited. The present holder, the father, head or representative of the family may have full and absolute right in the sense that to him belongs the decision of what are necessary or useful expenses of the family according to the norm of a wise control. But he must use the property for the purposes of the co-ownership and society, and on his death must so place the property that it can be distinguished so as to enable the relative owners to succeed to it. Testamentary power of such a head will be out of the question.

If then the holder of the impartible estate has full power of transfer *inter-vivos* and free power of disposal by will, and if nobody takes any present right to the property it is really his absolute property. To say that coparcenary or co-ownership in it still exists is to ignore the very essence of the thing.

There seems to be little sense in saying that coparcenary in it does not exist for the purpose of determining the relative

¹ Baijnath *vs.* Tej Bali; Sartaj Kuari's case.

² Sartaj Kuari's case.

³ Baijnath *vs.* Tej Bali.

position of the members so far as the right of disposal is concerned, and that it does exist for the purpose of determining who will be the next owner. This is only another way of saying that though coparcenary in the property does not exist, we shall apply that rule of succession to it which is applicable in the case of coparcenary property. Or in other words this only means the introduction of a novel rule of succession unwarranted by any custom or law.

Lord Dunedin disposed of Sartaj Kuari's case by advising "not to fasten the attention on the word 'Coparcenary' but rather to see what actually was decided in the case," and observing that "what was decided was that in an impartible raj there was no restriction on the power of alienation by the member of the family who was on the Gaddi and was in possession, in respect that there was no such right of co-ownership in other members as to give them a title to prevent such alienation." He does not question the propriety of this decision. But is not the rule of succession by survivorship based on this co-ownership? We are following the Mitakshara law, and Vijnaneshwara at least bases his rule of survivorship on his theory of co-ownership by birth.¹ If the very

¹ The following is the argument of Vijnaneshwara on the point :—

तत्र दायव्यवहारे यत्नं स्वामिसम्बन्धादेव निमित्तादवस्य सम्भवति तदुच्यते । स च द्विविधः, अप्रतिपन्धः सप्रतिपन्धश्च । तत्र पुत्राणां पीडायाश्च पुत्रत्वे न पीडात्वे न पितृधनं पितामहधनञ्च सम्भवतीत्यप्रतिपन्धी दायः । पितृव्य-पुत्रादीनाम् पुत्राभावे स्वाम्यभावे च सम्भवतीति पुत्रसङ्गावः स्वामिसङ्गावश्च प्रतिपन्धसङ्गादभावेऽप्यतुल्येन पितृव्यत्वेन च सम्भवतीति सप्रतिपन्धी दायः ।विभागो नाम द्व्यसुदाय-विषयाणामनेक-स्वाम्यानांनैक-द्वेषु व्यवस्थापनम् ।विभागात् स्वल्पं उत स्वल्पं सतो विभाग इति । तत्र विभागात् स्वल्पमिति तावत् युक्तम् । जातपुत्रस्यापानविभागात् । यदि जन्मनैव स्वल्पं स्यात् ततोत्पन्नस्य पुत्रस्यापि तत् स्व साधारणमिति द्व्य-साध्येत्याधानादितु पितुरनधिकारः स्यात्अथोच्यते लोकाप्रसिद्धमेव स्वल्पमित्युक्तम्, लोके च पुत्रादीनां जन्मनैव स्वल्पं प्रसिद्धतरत्राप्युक्तमस्ति । विभागव्यवहारं बहुस्वामिकाधन-विषयो लोकाप्रसिद्धो नामदीयविषयो न प्रदीयविषयः । तथोत्पत्तौपचार्यस्वामिन् समेत्येवाप्या इति गीतमवचनाच्च । अथिसुक्ताप्रवाधानानित्यादिवचनञ्च जन्मना स्वल्पञ्च एवोपपद्यते ।पितामहस्य हि स्वार्जितमपि पुत्रे पीते च स्वल्पेयमिति वचनं जन्मना स्वल्पं गमयति ।तस्मात् पैत्रिके देतामहं च द्वये जन्मनैव स्वल्पम् । तथापि पितुरावच्छेदेन चत्वेत्यर्थे वाचनिकेन प्रासाददानकुटुम्बभरणापक्षिणीचादिषु च स्वावरत्यतिरिक्ताद्व्य-विनिर्वाते स्वातन्त्र्यमिति स्मृतम् । स्वामिने तु स्वार्जिते पित्रादिप्राप्ते च पुत्रादिपारतन्त्र्यमेव ...प्राप्तव्यवहारितु पुत्रेण पीतेन च चतुर्गानादी च समर्थेण सातुम् वा तत्रादिषु च विभक्त्येव सम्यक्कुटुम्बव्यापिनाम् आपदि तत्पीतव्यं वाच्यवक्तव्येन च पितृनादादिषु स्वावरस्य दानाधानविशेषण एवोपि समर्थः कुर्यादिति ।

reason for the restriction is wanting in impartible estates, it is equally wanting for survivorship.

It would no doubt have been a bold step if the Judicial Committee could pronounce Sartaj Kuari's case as wrongly decided and declare that coparcenary or family co-ownership would exist even in impartible estates for all purposes. But their Lordships perhaps felt their own incapacity to change a rule on which they themselves have conferred the character of law, and so, instead of overriding it wanted only to limit its operation, thereby giving rise to the anomaly. The rule laid down was clear enough, and if their Lordships were unable to override it, it would have been much better to stick to it for all purposes and thus to add to the certainty of law.

Even then there was another way of getting over the difficulty. The impartible estates in question being of the nature of Raj, it was more of the nature of an office than of any property that vested in the present occupier, and Vijñaneshwara or any other Hindu jurists never meant their rules to be extended to such offices. The entire incident of such estates might have been based on custom, and thus saved the anomaly of introducing an altogether new rule of succession.

The other rule laid down in *Baijnath vs. Tej Bali* is equally objectionable. In *Narayan vs. Nayanivaru*¹ the rule seems to have been laid down for the first time by their Lordships Sir Charles Turner, Kt., Chief Justice, and Mr. Justice Muthusami Ayyar. In the Judgment of the High Court an authority is referred to in support of the rule saying "Texts which recognize the right of Primogeniture recognize also the superior right of brethren in the order of seniority." Their Lordships had in view a passage in the *Mitakshara*² which runs as follows:—"The eldest brother may take the patrimony entire, and the rest may live under him as under their father"....."The portion

¹ 4 Mad. 250.

² Mit., Chap. I, iii. 3.

deducted, for the eldest is the twentieth part of the heritage with the best of all the chattels ; for the middlemost, half of that ; for the youngest, a quarter of it." But then they ignored the passage where the same author says : "True this unequal partition is found in the Sacred Ordinances ; but it must not be practised because it is abhorred by the world ; since that is forbidden by the maxim 'practise not that which is legal but is abhorred by the world, for it secures not celestial bliss.'"¹ So, if primogeniture is anywhere to be found it would be there only by custom, not by virtue of any text of Vijnaneshwara. It has, at least, always been upheld as the creature of custom and not on the strength of any general rule of law to be found in the Mitakshara or anywhere else.

Besides the text scarcely bears the meaning which has been placed on it. It may recognize superior right of brethren in order of seniority in getting some special portions, but it scarcely goes beyond that. It does not, at any rate, speak of representation in the matter of this preference. But Lord Macnaghten² took this for a decision of the Judicial Committee and being thus of opinion that the question was concluded by authority declined to enter upon any further investigation of it.

We have already noticed that the Judicial Committee always emphasised the fact that primogeniture being the creature of custom, it would extend only so far as the custom proved in the case covers, and never beyond that. In some of the cases the Judicial Committee did lay down a rule to be followed in cases of collateral succession or survivorship. It was laid down that at first the class is to be determined by the application of the ordinary law, and then, when the question of the selection in the class arises, the rule of prior birth is to be

¹ *Ibid*, I. iii. 4.

² *Kachi Kalyana vs. Kachi Yuva* : 2 C.L.J. 231 (P.C.)=32 I.A. 261.
=28 Mad. 508.

applied. In that view also *Bajinath vs. Tej Bali* would be wrongly decided. The application of the ordinary law would go in favour of the uncles, they being nearer in degree. In that class the seniormost uncle should succeed.

But so far as the principle of coparcenary is decided by *Bajinath vs. Tej Bali* it has already been followed in several cases and we shall name only a few of them in this place. The first case where the authority of *Bajinath vs. Tej Bali* was cited with an attempt to extend its operation to the extreme legal consequences that might follow from coparcenary, is *Sri Pratab Chandra Deo Dhabal Deb vs. Sri Raja Jagadisachandra Deo Dhabal Deb*.¹ The parties here were also governed by the Mitakshara law and the history of the family is to be found in *Mohesh Chandra Dhal vs. Satrugna Dhal*² where a genealogical table is given. In the present case the plaintiff was claiming under a will of the last holder though admittedly the defendant would be the preferential successor by survivorship. Defendant's contention was that having regard to the principles enunciated in *Bajinath Pershad vs. Tej Bali* the holder of an impartible Raj has no power to alienate it, at any rate by testamentary disposition. Their Lordships did not uphold this contention, saying that *Bajinath Pershad's* case did not decide any such thing, the decision being strictly confined to the question of succession. The law as to the present holder's power of alienation³ *inter*

¹ 40 C.L.J. 331 (decided by Sir N. R. Chatterjee, Kt., J., and Mr. Justice Chotzner) confirmed by the Privy Council in 46 C.L.J. 136 (P.C.).

² 29 Cal. 343 (P.C.) = 29 I.A. 62.

³ As to the requirement to establish inalienability, see *Sartaj Kuari vs. Deoraj Kuari*, 10 All. 272 (P.C.) = 15 I.A. 51; *Durgadut Singh vs. Rameshwar Singh*, 36 Cal. 943 (P.C.) = 10 C.L.J. 233 = 36 I.A. 176.

Rana Mahatab Sing vs. Badan Singh : 48 I. A. 446 (464-65).

Ram Nand vs. Surgiania : 16 All. 221.

vivos or by will is to be found in the 'Sartaj Kuari's' ¹ case and in the Pittapur case.²

We shall next mention the Jharria Raj 'case' ³ where the possibility of coparcenary in the impartible estate was almost assumed and the parties were fighting over the question as to what would constitute partition.⁴

If jointness in impartible estate is possible, and if there is so much difference in the rule of succession to impartible estate according as it is joint or separate, a question of much consequence arises as to what constitutes separation in such cases. The very nature of the property is such as would

¹ 10 All. 272 (P.C.)=15 I. A. 51.

² 22 Mad. 383 (P.C.)=26 I.A. 83.

³ F.A. No. 194 of 1931 (N. R. Chatterjee and Panton, JJ.)

Disposed of on the 17th August, 1925=42 C.L.J. 280.

⁴ Several cases were cited and reviewed on this point. The following may be noticed here :—

Pundit Suraj Narain *vs.* Pundit Ikbāl Narain : 40 I.A. 40.

Girja Bai *vs.* Sada Shiv : 14 C.L.J. 207.

Chowdhury Chintamun *vs.* Nowlukho : 2 I.A. 263=1 Cal. 153.

Yanumula *vs.* Yanumula : 13 M.I.A. 336.

Periasami *vs.* Periasami : 5 M.I.A. 61.

Yarlagadda *vs.* Yarlagadda : 27 I.A. 151.

Sartaj Kuari *vs.* Deoraj Kuari : 15 I.A. 51.

Sri Raja Viravara *vs.* Sri Raja Viravara : 24 I.A. 118.

Raja Rup Singh *vs.* Rani Baisini : 11 I.A. 149.

Maharani Hiranath Koer's case : 9 B.L.R. 274.

Jogendra Bhupati *vs.* Nityanund : 17 I.A. 128.

Muttuva Duganadha *vs.* Periasami : 23 I.A. 128.

Sabramanya Panday *vs.* Siva Subramanya : 17 Mad. 316.

Parbati Kunwar *vs.* Chandrapal Kunwar : 31 All. 457 (P.C.)

Thakurani Tara Kumari *vs.* Chaturbhuj : 42 I.A. 192 (The Telva case).

Rani Jagadamba *vs.* Wazir Narain : 50 I.A. 1=28 C.W.N. 25.

Naraganti *vs.* Vankata Chalpati : 4 Mad. 250.

admit of no partition of the estate itself and hence the question has very often come before the courts of law for decision.

We shall here again give the case of Sri Raja Yanumula Venkayamah *vs.* Sri Raja Yanumula Boochia¹ already referred to by us in another connection. In this case it was held² that the presumption of jointness raised by the Hindu law would equally apply to impartible estates, and the *onus probandi* lies on him who claims the estate as the self-acquired or separate property of the last holder. It is sometimes urged³ that it is not very clear whether the jointness in question related to this property alone or to the family as a whole. But the question on which the parties in the suit joined issue and went to trial was, whether the *family*, of which the plaintiff and the appellants' husband were members, was an undivided or divided Hindu family; and what was found joined was the "general status of the family." No doubt even if the family is a joint one, its members may have separate self-acquired property⁴ and succession to such property would follow the rule of inheritance and not of survivorship. But the converse of this seems hardly sustainable. If the family is separate, a property may still be held jointly; but it is difficult to see why the rule of survivorship would apply to such property. As soon as the status of the family is that of a separated one, its corporate existence is at an end and the shares of individual members are defined, and ascertained. If now they would elect to hold any property jointly the property should be treated only as a property held in common, their respective shares in it having been defined, and if any member would now die his share shall descend to *his* heirs. The Judicial Committee in *Appovier vs.*

¹ 13 M.I.A. 333.

² Sir J. Colvile delivered judgment in 1870.

³ See the Jheria case = 42 C.L.J. 286.

⁴ See the Shivaganga case; the Tipperah case, etc.

Rama Subbaiyan¹ had to deal with the question and their Lordship decided that there would be no survivorship in such joint property. There are other cases² however where it was held that though coparcenary ceases as to some of the property it may continue as to the rest.

The question becomes important only under the Mitakshara system where rules of succession to separate and joint properties are materially different from one another. In joint property the principle of survivorship applies and this is based on the Mitakshara theory of property and proprietary rights. According to Vijnaneshwara 'पैत्रिके पैतामहे च द्रव्ये जन्मनेव स्वत्वम्' and if any one acquires any interest in the property of his ancestors he does so by virtue of his relationship alone—'स्वामिसम्बन्धादेव निमित्तात्.' But before partition he has no specified share in the property: the ownership is only a joint one and partition means, "द्रव्यसमुदाय विषयाणामनेकस्वाम्यानाम् तदेकदेशेषु व्यवस्थापनम्. Before partition,—before this separation of ownership and placing of the each on specified portions—each birth and death would cause fluctuations in individual interest, and this would continue so long as the family would continue joint. It thus seems to have reference to the corporate nature of the family and as soon as that character is lost there would be no further application of the principle.

It may not be out of place to notice here that this 'जन्मस्वत्ववाद' of Vijnaneshwara extends only up to the great-grandson. Vijnaneshwara indeed names only son and grandson as he speaks of 'पैत्रिके पैतामहे च द्रव्ये.' But the Viramitrodaya explains that the great-grandsons also are

¹ 11 M. I. A. 75. See also Rewan Persad *vs.* Radha Beeby : 4 M. I. A. 137. Narayan *vs.* Lakshmi Ammal : 3 Mad. H. C. 289. Also Mayne, Hindu Law (Seventh Edition), p. 669.

² Kandasami *vs.* Doriasami : 2 Mad. 324 ; 4 M.I.A. 168. Radha-charan *vs.* Kripa : 5 Cal. 474. Muthusami *vs.* Nallakulantha : 18 Mad. 418. Gauri Sankar *vs.* Atmaram : 18 Bom. 611.

included in the category. The principle of acquisition of co-ownership by birth does not extend beyond him and if other relations do succeed, they do so by inheritance.¹

The question as to what constitutes partition has elaborately been gone into in the Jharia case² already referred to, and their Lordships after an elaborate review of cases³ arrived at the conclusion that it is possible for a family to remain undivided with respect to the impartible estate notwithstanding partition of the partible property.⁴

What constitutes partition of the family having impartible estate.

¹ See Dr. Sen's Hindu Jurisprudence, p. 127 (T.L.L.).

² Rani Prayag Kumari Devi and others *vs.* Shiva Prasad Singh : F.A. No. 194 of 1921, decided on 17th August 1925, by N. R. Chatterjee and Panton, JJ., 42 C.L.J. 280.

³ The cases reviewed are:—Pundit Suraj Naraian *vs.* Pundit Ikbal Narain : 40 I.A. 40=17 C.L.J. 288. Girja Bai *vs.* Sadashiv : 14 C.L.J. 207. Chowdhury Chintamun *vs.* Msst. Nowlukho Konwari : 2 I.A. 263=1 Cal. 153. Sri Raja Yanumula *vs.* Sri Raja Yanumula : 13 M.I.A. 336. Periasami *vs.* Periasami : 1 Mad. 312 (P.C.) 5 I.A. 61. Yarlagadda *vs.* Yarlagadda : 24 Mad. 147=27 I.A. 151=17 Mad. 362. Sartaj Kuari *vs.* Deoraj Kuari : 15 I.A. 51=10 All. 272. Sri Raja Viravara *vs.* Sri Sri Viravara : 24 I.A. 118=20 Mad. 256. Raja Rup Singh *vs.* Rani Baisini : 11 I.A. 149=7 All. 1. Jogendra Bhupati *vs.* Nityanund : 17 I.A. 128=18 Cal. 151. Moharani Hiranath Koer's case : 9 B.L.R. 274. Muttuvaduganadha *vs.* Periasami : 23 I.A. 128=19 Mad. 451. Parbati Kunwar *vs.* Chandrapal Kunwar : 36 I.A. 125=31 All. 457. Thakurani Tara Kumari *vs.* Chaturbhuj : 19 C.W.N. 1119=42 I.A. 192. Rani Jagadamba *vs.* Wazir Narain : 50 I.A. 1=28 C.W.N. 98. Girja Bai *vs.* Sadashiv : 43 I.A. 151=20 C.W.N. 1085. Naraganti *vs.* Venkatachalpati : 4 Mad. 250.

⁴ As to what constitutes severance of jointness see also Msst. Bhagwani Kunwar *vs.* Mohan Singh : 29 C.W.N. 1037 (P.C.). Khunnillal *vs.* Govinda : 38 I.A. 87=15 C.W.N. 545. Obhoy Churn *vs.* Govinda : 9 Cal. 237. Girjabai *vs.* Sadasiv : 20 C.W.N. 1085 (P.C.)=43 I.A. 151=43 Cal. 1031=24 C.L.J. 207. Kawal Narain *vs.* Budh Singh : 26 C.L.J. 101 (P.C.)=44 I.A. 159=39 All. 496. Mayne, Hindu Law, p. 671.

We shall here mention one case which does not seem to have been referred to in the judgment in the Jharia case, but on which a particular argument of the Advocate General seems to have been based. I mean the case of *Rao Kishore Singh vs. Musst. Gahena Bai*¹ which decided the important question that a custom of primogeniture found and established becomes the law of the family estate, and the ordinary Hindu Law does not apply to it save so far as it is not inconsistent with the custom. Such a custom may, if observed and acted upon, survive the primitive condition of things out of which it originally, from the very necessity of the case, sprang; and the head of the family for the time being, cannot, by accepting from the Government of India a Sanad containing clauses inconsistent with the custom, destroy it or render it inoperative.

The history of the estate in dispute was that the ancestors of the plaintiff came from the north and occupied the Central Nimar about 20 generations ago. They subdued the Bhils three or four centuries prior to the Mahomedan conquest of Nimar and were chiefs. The Bhibala, the family to which the litigants belong, sprang originally from the intermarriage of one of the invading Rajput chieftains with a member or members of a local clan inhabiting the hills bordering on Nerbudda, and are now true Rajputs. These Rajputs brought with them the institution of their race, one of which is Gaddi, the succession to the Gaddi being by primogeniture and the other members being provided with maintenance. The Mahomedan rulers subsequently made of these chiefs hereditary zemindars or fiscal officers of their tracts with 'hucs' and in later times the Rajput zemindars were deprived of all fiscal functions, though they were allowed to retain their title of zemindar and the hucs and lands attached to their office. These zemindars had property in the lands which were considered their private

¹ 24 C.W.N. 601 (P.C.) (1919).

property and they rendered some nominal service to the state till the advent of the British Government.

In delivering judgment in this case Lord Atkinson observed: "No doubt one of the ways in which impartible estates may originate is by independent chiefs or feudatories, exercising almost autocratic powers, being gradually in course of time reduced by a paramount power to the position of ordinary zemindars; but these impartible estates may also owe their origin to family arrangements, followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only, without any power of interference with the management." His Lordship further observed: "It is difficult to see why a family should not similarly agree expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times, after the condition had completely altered." Their Lordships therefore are of opinion that the principle embodied in the expression "Cessat ratio cessat lex" does not apply where the custom outlives the condition of things which gave it birth.

I have already discussed how custom can grow and I shall not detain you longer over this matter. But the agreement thought of as origin of custom seems to have reference, not to any conscious agreement of the parties, but to one that would arise from the exercise of their volition in favour of remaining joint when separation was possible. It would perhaps follow from the texts like "सर्वं वा पूर्ववत्तेतरान् विधत्वा" ¹ "ज्जेड एव तु मज्झीमात् पित्रं धनमशेषतः। शेषास्तुपत्नीनेपुत्र्यदेव पितरं तथा॥" ² These

Custom of impartibility, how it grows.

¹ Gautama Samhita, Chap. XXIX.

² Manu Samhita, Chap. IX. 105.

contemplate that the members had the option of following either of the two courses open to them. If, for generations together, the exercise of their volition would follow one course, gradually that would become a custom in the family.

We have already seen how impartibility of the joint family property might have been the product of the natural bent of ancient Aryan mind which was in the direction of keeping up the unity of the household though at the cost of curtailing individual tendencies. In fact, we find among all the branches of the Aryan race manifestations of the so-called united family or joint family arrangement. "The most extensive and best described practices of this kind are to be found in India and among the Southern Slavs ; but there are many traces of similar institution in the history of the Germans, of the Eastern Slavs, and of Roman nations."¹

Impartibility of some estates might have been the result of another equally extensive tendency of races,—I mean the tendency at unification of holdings. Professor Vinogradoff has made a careful survey of this tendency² and said, "There is no necessary connection between servility and the unification of holdingsAll systems of unified holdings, except the joint family, start from the exclusion of some of the heirs in favour of others. This ruling consideration may develop in two different ways. If authority is the most important institution, then seniority and primogeniture are clearly indicated in the case of inheritance. This is the case in all patriarchal arrangements. We need not go back to the Paterfamilias rule, except to say that the natural substitute for it is the rule of the eldest brother, and that for this reason the most common political institution of early ages is the rule of the eldest. Nor is it necessary to dwell at special length on primogeniture applied to military tenure. We might just point to a parallel to the Western

¹ Vinogradoff, *Outlines of Hist. Jur.*, 261.

² *Outlines of Hist. Jur.*, Chap. VII, particularly from p. 282.

Knight's fees in the impartible succession to the Indian raj." ¹ The converse case of ultimogeniture is indeed a more strange institution and Professor Vinogradoff has given an explanation of it. ²

It will be beyond our purpose here to discuss at length the disabilities of women imposed by ancient law as regards succession to landed property. ³ Suffice it would to say here that in India such females can be excluded only on the authority of a special custom of exclusion proved in the case. ⁴

We have already had occasion to notice the question of inalienability of impartible estates. Sartaj Kuari's case, the Pittapur case, and the Hunsapur case are sufficient authority for the power of alienation wielded by the present holder of such an estate. Yet if we look to the history of these impartible estates we again grow suspicious of the existence of such rights. No doubt in cases where the impartibility originates from the estate being in the nature of an office, its alienability cannot be questioned by any member of the family. If alienation injures anybody it is the person under whom the office is held and mere expectant office-bearers can hardly be given the right of restraint. In the other case, however, where there is a real coparcenary there ought also to be this right of restraint given by the general law governing the family. In cases of intermixed estates again such inalienability or alienability for limited purpose ought to have been the logical consequence. But such distinctions are hardly ever adverted to ; and sometimes the extreme view that all impartible estates are alienable would be put forward saying "impartibility leads logically to the existence of a rule of

¹ Outlines of Hist. Jur., pp. 284-285.

² *Ibid*, p. 25.

³ See Vinogradoff, Out. Hist. Jur., pp. 286-288.

⁴ See the *Shivaganga case* : 9 M. I. A. 539.

alienability and not to that of inalienability " while at others the holder will be attempted to be reduced to the position of a mere life-tenant.

If coparcenary in impartible estates does exist, as has been intimated by Lord Dunedin¹ in *Baijnath vs. Tejwali*, one should logically expect to see some sort of restraint put upon the power of disposal of the present holder. At any rate even if this coparcenary be 'no presently existing right' and nothing higher than "a chance of success" there ought to have been some guarantee for this chance not being reduced to a mere shadow at the hands of the present holders. It ought to have been at least a chance determined only by law and by circumstances other than those dependent on the mere will of the last holder. Or do not call it a co-parcenary, or co-ownership. Even if we concede the unrestrained right of alienation *inter vivos*, it is difficult to see how testamentary power can be maintained. You know how testacy in general grew. Various, indeed, have been the theories of foundation of testamentary powers. I shall give you a passage from Miraglia's *Comparative Legal Philosophy*² where the great jurist has collected these several theories : "The theories of Plato and of Aristotle on this subject were inspired directly by the political conditions of the place and time in which they were formed. Plato taught that the right to make a will is the result of the excessive condescension of the legislature, since the testator did not have full consciousness at his last moments ; that for such a right there should be substituted the perpetual transmission of the estate in the same family ; and that upon the failure of sons, the father should have the power to dispose of only one-tenth of his estate, the remainder going to his adopted son. Aristotle saw no other means for the

¹ See however 46 C. L. J. 136 (P. C.) in which case Lord Dunedin was also a member of the Board. This case explains that the term coparcenary was loosely used in *Baijnath's* case.

² *Modern Legal Philosophy Series*, Vol. III, p. 741.

preservation of the estate in the family than the abolition of the testamentary power, for which he would have substituted perpetual transmission in the *male line*. Roman philosophers, on the other hand, preferred the will, largely Roman in its birth and development. Cicero, Seneca and Quintilian, assigning to this right the natural base of the sentiment of friendship and benevolence, were careful to bring to light the close connection between testamentary power and foresight for the future. The juriconsults did not seek philosophical principles, but they did not know how to conceive of the power to will as the result of indulgent laws. Testamentary power in the eyes of Ulpian had but one relation to law, and that was to find in it no obstacle....

..... Among the writers on natural law who represent the two opposite doctrines, Grotius and Puffendorf are the most distinguished. Grotius believed that the power to will lies in natural law and likened it to a contract, defining it as an alienation, conditional upon death, revocable until the last moment of the life of the alienor, with reservation of possession and enjoyment in his favour..... Kant observes that the right conferred by a will upon the heir is the right of accepting after the death of the testator his promise made in his last moments to give his goods under certain conditions.....

On the other hand Puffendorf argues that a will is a creation of civil law and opposes its assimilation to contract, because a contract presupposes a meeting of two minds which does not happen in the case of a will. The French law of 1791, which abolished almost entirely the right to will, is the logical consequence of the conception that testacy has its foundation not in the nature of things but rather in convention and social utility...

..... Leibnitz, in order to find a principle on which to base his theory of testacy, had recourse to the immortality of the soul." Miraglia has given various other theories and those who feel interested in the subject may refer to his book. If Roman Jurists have pointed out the ethical value of the power, there are others like Lassalle who characterise it as founded on

two antiquated notions, the absurd continuation of the will of a dead man, and the aristocratic co-ownership of goods in the Roman family. Some give it the disparaging character of being only a means for the satisfaction of posthumous vanity in man.

Whatever that be, it is now admitted on all hands that Hindu Law did not recognise the power of testacy; or more correctly, the power of testacy did not grow under the Hindu Law. We know under what circumstances the power was sought and obtained by the early Romans. Similar needs were not improbable in early Hindu community; but these were satisfied otherwise. The law of adoption developed and even the primogenitus could adopt sons who would be as good as a son born to him.¹

The history of the law of primogeniture here is thus intimately connected with the history of impartible estates though, of course, impartibility does not necessarily mean primogenitary rule of succession. The year 1793 indeed marks an important epoch in the life-history of primogeniture. Before that, the rule scarcely affected the question of succession to any property. We need not again enter into the controversy as to whether our zemindars and talukdars were landed proprietors prior to the famous pronouncement made in 1793. I have placed enough materials before you to show that they were not the proprietors of the soil. We are not much concerned with the question whether they were made proprietors by the Government of Lord Cornwallis in recognition of a right or only in pursuance of a deliberate policy,² and whether the motive for the pronouncement was to safeguard against the assumption of jurisdiction by the

The history of primogeniture in British India, intimately connected with the history of impartible estates.

¹ See 26 I.A. 83 (The first Pittapur case).

40 C.L.J. (Dhalbhum case).

² See Campbell, Cobden Club Essay, p. 168.

supreme court ¹ or to cause dismemberment of large zemindars. It may be "the Government having found the uncertainty of tenure of the zemindars and others to be attended with much evil, made the zemindars in one sense proprietors."² We may indeed overlook the question whether they were made sole and absolute proprietors or whether it was only as between the Government and the zemindars that the zemindars became proprietors instead of mere revenue officers. What concerns us much is that rightly or wrongly these zemindaries became the property of a zemindar. One consequence of this declaration was that the custom of primogeniture, where it was retained, thenceforth became a proprietary privilege. The custom originated in connection with succession to some office gradually made hereditary, the property, if any, attached to the office descending to the successor as a matter of course.

We have seen that when zemindar's property in land was created by the Regulations of 1793, all the incidents of property were sought to be attached to the zemindary. It was made freely transferable by sale, and in every respect put on the footing of property. The original code even declared the custom of single succession to have been an invention of the Mahomedans for revenue purposes, and sought to abolish it, laying down that questions of inheritance and succession to zemindaries shall not be regulated by rules different from those governing all other properties. The ordinary personal law of the incumbent shall apply. We have seen how a subsequent regulation modified this provision and permitted the rule of primogeniture in some jungle mehals and other districts, where it was well established as custom. The "sinister interest" of the Government in 1793 was to cause dismemberment of the large zemindaries. Large and influential zemindars were a constant source of trouble to the then government; and it was its interest to weaken them.

¹ See Lect. XVIII: also Halhed's *Memoirs*, etc.

² Cobden Club Essay, p. 168.

Whether the legislation against primogeniture was the result of any conscious design to weaken this source of trouble or not, the "sinister interest" ¹ seems to have caused, at least, an amount of prejudice which led the legislature to overestimate and keep before its mind the strength of arguments against primogeniture, always keeping prominent its evils and underestimating its usefulness. Law indeed bears much the stamp of heredity and legislators' opinion influences its character. Even the prejudices and modes of thinking which the legislators acquire in their youth would not be without effect on the law they are called upon to give late in life. But every rule has its exception and here we find this deviation from the general rule. Legislators who proved hostile to Indian primogeniture were very much accustomed to primogeniture at home. So there must have been a powerful deflecting cause.

But the judiciary did not at once share this legislative policy. Judges are always slower than the legislator in assimilating the policy of the day. "If a statute is apt to reproduce the public opinion not so much of to-day as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday."² The ideas of expediency or policy accepted by the courts may differ considerably from the ideas which guide legislation.³ And this difference seems to be responsible for the few yearly judicial pronouncements as to the true import of these various regulations relating to primogeniture. The opinion that the Regulations purporting to annul primogeniture could not affect any custom or family usage cannot be said to be wrong, though not in keeping with the policy of these Regulations. Custom or family usage forms an integral part of our personal law and if impartibility and primogenitary succession were the usage in a family, the judiciary was right in giving effect to it.

¹ To use a favourite term of Bentham's.

² Dicey, *Law and Opinion*, etc., p. 367.

³ *Ibid*, p. 365.

We have seen how when the zemindary became property it necessarily became alienable also. You must remember this only affects the Government. If the zemindary was ever inalienable, it was so only for the Government under which it was an office. The heirs and successors have very little to complain on this count.

But when it is said that "impartibility leads logically to alienability and not to a rule of inalienability" it is far from historically correct. The history of the institution in India that has already been placed before you would show how far this is consistent with it. The dictum ignores that impartibility often points to a fact that would even expose its true character as something else than what it is represented to us to be. It often shows that it is impartible because its very nature did not admit of partition; alienation was only unthinkable.

Yet when the stamp of property was fixed on it, it became alienable. If it is property and if indeed it can descend only to the primogenitus, he may be said to have absolute, unrestrained ownership in it and hence must have full power of alienation. The policy of dismemberment would also favour alienation. But is it possible for anybody else to have any interest in the estate that would limit this power of alienation? Or in other words is there coparcenary in the impartible estate which descends to a single successor? You have seen how this question has been answered differently for different purposes by the judiciary. If we look to the history of impartibility the answer suggested will again be different for different estates. Coparcenary in political offices certainly was not possible, even when such office was made heritable. Impartibility however does not always mean that originally it was of the nature of an office. We have seen how the very bent of ancient Aryan mind was in the direction of keeping up the unity of the household at the cost of curtailng individual tendencies. On the death of a Hindu father, his property becomes divisible among his sons; but it is seldom divided. This non-division

might in certain cases have given rise to the custom of impartibility; and surely where history can ascribe the origin of the custom to such early non-division we shall be justified in saying that coparcenary in it does exist, and does exist for all purposes. All the consequences of co-parcenary must follow. When such is the origin of impartibility it is difficult to see how the present incumbent can in any way, either by acts *inter vivos* or by will, place such property beyond the reach of the coparceners. It is difficult in such cases to make it coparcenary property for the purpose of succession, but not so for alienations. Here would truly be the two unequal rights in the estate; "the full and absolute right of the father, head, governor and representative of the family," given him by custom so that to him belongs the decision of what are necessary or useful expenses of the family, and the relative right of others who but for the custom would have been entitled to a share. But he must use it for the purposes of the co-ownership and family and beyond what is necessary for such purposes, must not so place the estate that at his death it cannot be distinguished and succeeded to by the holder of relative rights.

Where impartibility originated because it was in the nature of an office under the Government, no such question of two rights in it can arise. The present incumbent should have full, absolute right uncontrolled by any other dormant relative right in anybody. His employer alone can be said to have any such right of restraint. Here then there would be no coparcenary, neither for alienation, nor for succession. The possibility of coparcenary in such cases would commence from the time when the office is made property.

There were however certain political offices where the office could be held only by some member of a certain family. In a case like this the chance of succession open to the members of the family may be looked upon as giving them a sort of right analogous to the coparcenary right in a Hindu private family. Such might have been the case in certain principalities.

But here again the power of alienation, both *inter vivos*, and after death, cannot be unrestrained.

But you have seen how the law on this point stands. It is judge-made law and as such is only a hypothetical one. Dicey is of opinion that judicial legislation aims, to a far greater extent than do enactments, at the maintenance of the logic or the symmetry of the law. "The main employment," says Dicey,¹ "of a court is the application of well-known legal principles to the solution of given cases, and the deduction from these principles of their fair logical result. Men trained in and for this kind of employment acquire a logical conscience; they come to care greatly, in some cases excessively, for consistency." Perhaps the Judicial Committee in deciding this question of coparcenary in impartible estates did not care so much for consistency of principle as for persistency in a certain decision. Lord Dunedin in *Baijnath vs. Tej Bali* reviewed many cases: but nowhere did he consider the question whether apart from prior decisions, coparcenary in impartible estate is consistent with its nature. But it is a maxim among lawyers that whatever has been done before may legally be done again, and therefore they take special care to record all decisions formerly made against common justice and the general reason of mankind. These under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly.²

No doubt respect for precedent is the necessary foundation of judge-made law. Besides law must be certain. But then, here there was at least one decision of the same Board which held otherwise, and that again was only a few months before. So there was ample occasion for a discussion beyond

¹ Law and Opinion in England, p. 362.

² Gulliver's Travels (Swift, Works, XI. Edited by Sir Walter Scott, and Edition), p. 318.

merely to advert to what had been the course of decision prior to *Gangadhar Ram Rao vs. Raja of Pittapur*.

Whether coparcenary in impartible estate does, or does not exist, you have seen the extent of the present holder's power. He is quite free to alienate it and he can give it away by will. So after this, coparcenary really retains very little of its force. To declare that coparcenary in it yet exists is simply to give you a mode of calculation as to who shall be the next successor. It reminds one of the English rule of finding 'purchaser' in solving problems of descent and its effect would only be to exclude certain females. It would not perhaps be so illogical to declare that females shall not succeed. Whatever that be, as the existence of coparcenary does not in any way curtail the rights of the present holder, the decision can hardly give rise to any real grievance. The full power of testacy is given to him and it may at least be assumed that among the holders of large estates undesigned intestacy would be of comparatively rare occurrence.

We have hitherto talked of primogeniture and impartibility always in the same strain. It must however be remembered that impartibility does not always imply primogeniture. Single succession would not mean succession by the eldest. I may here remind you of the rules of succession to certain religious endowments, particularly of Muths. The real owner of such properties is a juridical person, no human individual; and its apparent owner is its manager, variously called Sarbarakar, Shebait or Mahant. It will be beyond our purpose to proceed to an examination of the legal character of such persons.¹ Nor

¹ See *Babaji vs. Laxman Das*: 28 Bom. 215.

„ *Nataraja vs. Kailasam Pillai*: 25 C. W. N. 145 (P. C.).

„ *Raja Pēari Mohan vs. Monohar Mukherjee*: 48 I. A. 258
= 26 C. W. N. 133.

„ *Kartic Ch. vs. Gossain Rudrananda*: 25 C. W. N. 908.

„ *Kailash Pillai vs. Nataraj*: 32 M. L. J. 271.

would we stop here to discuss the history of several classes of such endowments.¹ Speaking of one of such institutions Lord Shaw said, "an *asthal*, commonly known in Northern India as *muthi*, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas*; the *chelas* are of two classes; celibate and non-celibate."² The head of such an institution is called a *Mahant* and it is the custom of the institution that determines who is to succeed.³ "The *Mahant* is the head of the institution. He sits upon the *gaddi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idols and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof *in trust* for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are celibates."⁴

So there could be no question of primogeniture in such cases. Yet I shall refer you to *Mahant Ramanooj Das vs.*

See *Thiruvambala Desikar vs. Chinna Pandaram*: 40 Mad. 177.

" *Muthuswamy Aiyar vs. Sreemathanithi*: 38 Mad. 250.

" *Basudeo Ray vs. Mahant Jugula Kishore Das*: 22 C. W. N. 841 (P. C.).

See also 1 Mad. 235 (P. C.); 40 I. C. 276; 8 A. L. J., 286; 42 I. C. 406.

¹ As to classes of *Muths* see *Mahant Ramanooj vs. Mahant Debraj*: 6 S. D. R. 328.

Also *Ram Prakash vs. Ananda*: 24 C. L. J. 116 (P. C.).

See also *Achyutananda vs. Jagannath*: 20 C. W. N. 122.

² *Ram Prakash vs. Ananda*: 24 C. L. J. 116 (P. C.) at page 119.

³ *Mahanta Ramanooj vs. Mahanta Debraj*: 6 S. D. R. 328.

Sammantha Pandara vs. Sellappa: 2 Mad. 175.

See also 11 M. I. A. 405; 1 I. A. 209; and 24 C. L. J. 116 (P. C.).

⁴ 24 C. L. J. 116 at p. 120.

Mahant Debraj Doss¹ where the pundit of the Sudder Dewanny Adaulut having been directed to state what was the law of the shastra in regard to the appointment of a presiding mahant of a muth his reply was :—" Under the circumstances stated in the question, the *principal chela* or pupil is entitled to succeed on the death of the presiding mahant of a mouroosi or hereditary muth. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which, according to the shastra, are sufficient for such disqualification, then in that case the presiding mahant should, during his life-time, select one properly qualified from among his pupils to succeed him. The person so selected will succeed."

A principle somewhat analogous to the rule of primogeniture is indeed named by the Pundit. These chelas were as it were the Mahant's sons, and the senior chela is his first-born. But this is only a superficial analogy and nothing more.

Similarly you will remember that in Mahomedan law there may be impartible Wakf property ; its mutawaliship would be impartible, but would not necessarily imply primogenitary rule of succession. In fact in religious offices in general, in the absence of evidence to the contrary and in cases where the office is already hereditary but cannot be enjoyed by several heirs in common, there will necessarily be unity of succession. But in such cases, in the absence of any evidence to the contrary, the succession rule will be supplied by that of lineal primogeniture.²

¹ (1839) 6 S. D. R. 328.

² Secretary of State for India *vs.* Syed Ahmed Batcha Sahib.

CHAPTER XI

THE HISTORY OF PRIMOGENITURE IN BRITISH INDIA (CONTINUED)

Junior Member's Rights.

In sketching out the utilitarian basis of succession, Jeremy Bentham points out the three objects which the legislator ought to have in view, and names them as (1) provision for the subsistence of the rising generation, (2) prevention of disappointment, and (3) the equalization of fortunes. "Man," says Bentham, "is not a solitary being. With a very small number of exceptions, every man has about him a circle of companions, more or less extensive, who are united to him by the ties of kindred or of marriage, by friendship or by services, and who share with him, in fact, the enjoyment of those goods which in law belong to him exclusively. His fortune is commonly the sole fund of subsistence on which many others depend. To prevent the calamities of which they would be victims, if death in taking away their friend took from them at the same time the supplies which they draw from his fortune, it is necessary to know who habitually enjoy these supplies, and in what proportions." This, according to Bentham, is the basic consideration which should guide the legislator in framing the law of succession. The facts mentioned by Bentham are such as would not admit of direct proofs. Consequently to avoid being involved in embarrassing procedures and infinite contests, the learned jurist recommends resort to general presumptions as the only basis upon which to base a decision, and ends by leaving to each individual the function of supplementing the law and making good its shortcomings by the exercise of testamentary power. "It is for each proprietor, who can and who ought to know the particular circumstances in which those who depend upon him will be

placed at his death, to correct the imperfections of the law in all those cases which it cannot foresee."

Some such considerations might have been in the minds of the law-givers of all ages. But certainly these could not have been the only factors in determining the laws of inheritance and succession. There are jurists like Rosmini and others who are not in agreement with the beliefs and doctrines of those who wish to base intestacy on consent, benevolence, or the presumption of the will of the deceased. The mere sentiment of benevolence is not, according to them, a claim or right. The conception of a presumption of will denies the right of the family and is the result of the principle of individual caprice, express, tacit or presumed. There have been times and countries, when and where all the laws of heredity were based on the family or community, the individual being entirely absorbed by the collective entity and having completely lost his personality. There no form of inheritance save the customary and unalterable would be recognised. There was no disposing individual and there could have been no will of such disposing individual. In such a system evidently there was another determining factor, and the law of succession was determined also by the share these successors had in the acquisition of the property. The historical development of succession is indeed connected with the evolution of property and of the family and is much influenced by the religious faith. None can deny the connection between inheritance and ancestor worship in primitive times. It will be beyond our purpose here to determine the foundation of inheritance. The right of inheritance really refers to social man and not to man in a hypothetical state of nature or isolation, and that while intestacy is founded on family co-ownership, testacy is founded on individual ownership.

The principle of complete intestacy lies in consanguinity or in that ethical organism of the family which shows itself by

a community of goods. "The sons, participators in the community, did not acquire upon the death of the father a new right, but merely obtained greater freedom in the administration of the goods."¹

Whatever be the foundation of inheritance, we may always separate three principal types from the almost infinitely varied systems of inheritance that have hitherto prevailed in different countries at different times. These three types may be named² as (1) the system of testamentary liberty, (2) that of enforced conservation, and (3) that of the reserve and of enforced partition. In the first system the intent of the owner is absolutely unrestrained and the owner is given the right to choose freely the system of distribution that suits him. The other two types will result from the state intervention in the matter of transmission of the estate. In such a case the state may either aim at preventing partition of the estate and endeavour by various means to insure transmission to a single person; or may prefer to divide the estate among a large number of persons rather than transmit it integrally. In either case a constraint is put upon the intent of the owner, though the action is exercised in them in different directions, one encouraging the concentration, the other the parcelling of the property. It is needless to say that there may be systems where two or more of these types are mixed up.³

It has been stated above that the type of enforced conservation presupposes a constraint put upon the intent of the owner and assumes state intervention in the matter of transmission of the estate. It is however conceivable that such a

¹ Miraglia, p. 745.

² See "Les Transformations droit civil" by Joseph Charmont, Continental Legal History Series, Vol. XI.

³ *E. g.*, the English system which is one of testamentary liberty, though it borrows something from the system of enforced conservation, for in certain cases it preserves the right of the eldest son.

The Mahomedan system is also a complex one.

constraint might not have been essential for the origin of this type. In some cases at least the origin of this conservation is ascribable to the free intent of the owners. We have noticed elsewhere how, in the Hindu law, inheritance, though divisible, was seldom divided, and how this non-division gradually gave rise to the custom of indivisibility. People felt the utility of non-division and gradually a juristic sentiment in favour of such non-division arose. Consistent with this sentiment there were those external, constant and general acts of non-division which ultimately gave rise to the custom of impartibility. Indeed every custom takes its birth in some need felt by the society. Satisfaction of such need might have been obtained, in the beginning, through some transitory and isolated acts gradually giving rise to a general conviction of the necessity of such satisfaction. Every custom is really formed under the influence of daily recurring circumstances of social life and is preserved by social traditions. It necessarily involves the two conceptions of the conviction and the constant and general use, the one being the basic principle and the other, an external expression. After the acts thus develop into a customary law, certainly their observance may thereafter involve constraint put upon the individual intent and state interference.

But what is germane to our present purpose is to see how the growth of impartibility would affect the rights of those others who, but for this non-division, would have taken some interest in the inheritance. It will be pertinent to notice here again the texts which go to show how non-division was the tendency of the Aryan mind though divisibility was the law. We have seen how Manu says : “*अथ एव तु गृह्णीयात् पितॄन् धनमश्वतः । शेषास्तुपत्नीवैयुष्येव पितरं तथा*”¹ Similarly Gautama enjoins *सर्वं वा पूर्वजस्येतरान् विभृयात्*² It should be remembered also how in the Mahābhārata non-division is repeatedly recommended. If anywhere in India, the custom of impartibility did

¹ Manu, IX.

² Gautama, XXXIX.

grow from this originally optional alternatives, it seems reasonable to expect that along with it, the customary right of maintainability of the junior members shall also develop. In an impartible estate of this nature, the junior member would surely have a legal right to maintenance. Originally they had the option of coming to a division ; but they did not take to this only as they preferred to be maintained by their elder.

If coparcenary in an impartible estate is at all thinkable, it surely did exist in such cases. In such estates junior member's right to maintenance would be a real right. The members of the family who can claim co-ownership certainly can claim maintenance out of it as well. Gradually however the number of claimants of this maintenance may be so large as to make it extremely burdensome for the owner of the impartible estate to meet the demand. Various devices might have been resorted to, to lighten this burden ; and instead of undertaking this unlimited liability portions of the property might have been granted to particular branches of the family in exoneration of all future claims to such maintenance. But this could develop only after the property had become impartible.

In some cases however impartible estate is in the nature of an office ; or it is impartible because originally it was merely an office. In such a case the man in office cannot be said to be under any legal obligation to maintain all the junior members of the family. At least their claim to maintenance has no necessary connection with the estate in question, and if they are to succeed they must succeed on the strength of their relationship with the present holder. They must stand within certain degree of nearness in relationship which according to their personal law would entitle them to claim maintenance. If it is difficult to say whether or not there is coparcenary in an impartible estate without a thorough knowledge of its origin and history, it is equally difficult to determine the position of its junior members without such history. Sometimes office-holder's private property got intermixed with his office as

soon as he succeeded in making his office his own property, and with the passing of time it has now become very difficult to distinguish the two. It may however be safely asserted that in every case such confusion has taken place, and the whole has in course of time become an impartible estate. It is quite probable that in such cases a custom giving the junior members right to claim maintenance would also grow side by side, and it would perhaps ever be pertinent to enquire into the existence of such custom in determining the question of maintenance. We shall see how our courts of law have approached the question.

We shall begin with *Naragunty vs. Vengama*¹ in which Lord Kingsdown observed that "a polliam is in the nature of a Raj. It may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time who is styled the Polliigar, the other members of the family being *entitled to maintenance or allowance out of the estate.*" If indeed the Polliam is in the nature of a Raj, it has certainly been in the nature of an office at its inception, the king having no private property in the Raj. Even though kingship be confined to a member of the family to which the Raja belongs, it is difficult to see how the Raj belongs to the family. As I have pointed out above, these Rajas very early succeeded in making these offices their property and sometimes even subdivided them amongst their sons and nephews so as to create in them a sense of property in the Raj. Moreover the intermixing of the Raj and the property of the Raja also helped the development of this sense.

Similar confusion, perhaps similarly justifiable, is to be found in the judgment of Beer Partab Sahee *vs.* Maharaja Rajendar Pertab Shahee.² Sir J. Colville observed that the Hunsapur estate "was an impartible Raj and by family custom descended on death of each successive Raja to his eldest male

¹ 9 M. I. A. 66.

² 12 M. I. A. 18 (The Hunsapur case).

heir according to the rule of primogeniture who took the whole subject to, the obligation of making to the junior members of the family certain allowance by way of maintenance." In *Yanumula vs. Yanumula*¹ their Lordships observed with reference to grants of portion of the estate: "These grants by way of maintenance are in the ordinary course of *what is done* by a person in the enjoyment of a Raj or impartible estate in favour of the junior members of the family, who but for impartibility of the estate would be co-parceners with him." Perhaps their Lordships in the last case meant that there was co-parcenary though no right to claim partition. They based the claim to maintenance on family co-ownership. The same learned Judge intimated the existence of such rights of maintenance and possible rights of succession in the junior members of a joint family in the case of a Raj or other impartible estate in *Peria Sami vs. Periasami*.²

Let us examine some of the earlier cases and take the case of *Himmat Sing Beehar Sing vs. Gunpat Sing*.³ The facts were briefly these: plaintiff Gunpat Sing sued Himmat Sing, the Thakur of Garod, to establish his right to receive maintenance, alleging that he was the son of the defendant by his wife Saheba Rani. Himmat Sing pleaded *inter alia*, that the plaintiff was not his son and even if he were he could not by custom claim any maintenance. The District Judge held that the plaintiff was the lawful son of the defendant by his wife Saheba Rani, and that he had a legal claim to be maintained by his father and decreed to that effect. On appeal, Westropp, C. J., observed "we have to consider two objections. It has been contended that a son could not sue his father for maintenance. And in support of this contention it is argued that a Hindu son has an equal share with his father in ancestral property *** and that therefore the plaintiff be left to enforce his rights if he can

¹ 13 M. I. A. 333.

² 5 I. A. 61 (70).
³ 12 B. H. C. R. 94.

by a partition suit. A custom has also been attempted to be set up to prove that the plaintiff should be maintained out of the allowance settled on his mother. It has been very properly considered on behalf of the defendant that the estate in question is impartible, being one to which the law of primogeniture applies, and no authority was cited to show that where a son could not enforce a partition with his father he was prevented from suing the latter for maintenance. We are of opinion that the custom has not been proved and that the property being impartible the disowned son would have no remedy except a suit for maintenance. We say nothing as to the right of a son to sue for maintenance where he might sue for partition." With regard to the latter point however a definite pronouncement had to be made by his Lordship sitting with Melvill, J., in special appeal No. 394 of 1872 decided on 20th April 1874, wherein it was laid down that "amongst the male members of an ordinary Hindu undivided family a suit by one co-parcener against the others for maintenance would be unsustainable. He would be entitled to sue for a share but not for maintenance unless indeed he were illegitimate, deformed or idiotic or suffering from some other disabilities to inherit; in which case he would not be partner entitled to an equal share with the other members of the family, but only a person entitled to maintenance."

The next case of some importance which deserves our attention here is the case of *Ramchandra Sakharamva vs. Sakharam Gopalvagh*¹ which arose in this way. In 1801 the Peshwa granted the village Kohiali in Poona District as Saranjam to Gopalballav Vagh who enjoyed it till his death in 1818, when the British Government resumed it and granted instead a political pension of Rs. 1,200 per annum to his son Sakharam during his life and a moiety to the second generation. Plaintiff Ramchandra was the son of Sakharam by his first wife and claimed maintenance alleging that his father had married a

¹ 2 Bom. 346.

second wife and at her instigation turned him out of the house without giving him any education or qualifying him for any calling or profession. Defendant Sakhamam contended that his son being adult was not entitled to separate maintenance according to Hindu Law and under Act XXIII of 1871 could claim no partition of the pension.

The Sub-Judge in rejecting the claim said, "If the allowance out of which a separate maintenance is claimed is impartible then such a suit as a present one will lie (*Himatsing vs. Gunpatsing*, 12 B. H. C. R. 94), but if the allowance is partible then the plaintiff is entitled to sue for share and consequently his suit for maintenance would be unsustainable.....The plaintiff being subject to none of the disabilities (as noted in Hindu Tenets) to inherit, is entitled to sue for partition, if the pension is partible, and I think the pension is partible."

The District Judge upheld this decision saying, "No authority has been shown for the claim of maintenance by an adult Hindu son, and in *Premchand Pepara vs. Hoolas Chand Pepara*¹ it was held that there was no authority for such in Hindu law. The allowance is one in which the son can claim a share which he should have done."

The plaintiff appealed. In the course of his judgment Melvill, J., observed—"I am unable to concur in the opinion of the courts below that pension is partible. A Saranjam is ordinarily impartible, and a pension granted in lieu of it would, I think, be equally impartibleAs a general rule a Hindu is not bound to support a grown-up son (*Prem Chand vs. Hoolas Chand*). But in *Himatsing vs. Ganpatsing* it was held that when the family estate is impartible and one to which the law of primogeniture applies a son can sue his father for maintenance. It appears to me that that decision governs the present caseI would reverse the decrees of the courts below and

¹ 12 W. R. 494 C. Rule.

allow the claim." Pinhey, J., although he concurred in the judgment delivered by Melvill, J., entertained considerable doubt on the point of law on which the decision of the case depended; for his Lordship observed:—"I have felt great doubts whether it is good Hindu Law to say that an adult son in an undivided Hindu family who is suffering from no disability recognised by that law can claim a separate maintenance from his father." In *Premchand vs. Hoolas Chand*, Mitter, J., in delivering the judgment of the court said—"We find no authority in Hindu Law to support the position that a father is obliged to support a grown-up son. I confess I am inclined to the same opinion. By Hindu law the obligations of a father and of a son are not reciprocal, *e.g.*, a son under Hindu law is liable for his father's debts but a father is not liable for his son's debts." Pinhey, J., observed in course of this judgment..."I think it not at all improbable that in some future cases when the point is further considered and exhaustively argued, *viz.*, whether in a united Hindu family, an adult son who is suffering from no disability can sue his father for separate maintenance, the authority of *Himatsing vs. Gunpat Sing* will be shaken. And I should certainly be glad to see that case over-ruled, for the rule which it lays down appears to me subversive of Hindu society and very injudicious."

It was certainly a step in advance when the courts proceeded to adjudicate on the claims of maintenance by persons other than the son or daughter of the deceased holder of an impartible estate. We may take the case of *Nilmony Sing Deo vs. Hingoolal Sing Deo*¹ as an appropriate one. There the plaintiffs (Hingoolal and another) were two brothers, being the sons of the late Sojilal Jugmohon Sing Deo who was third brother of the late Raju, and therefore uncle of the present Raja (Nilmony Sing Deo), the defendant. Jugmohon had a maintenance grant of a pargana yielding an income of Rs. 15,000 per annum. On his death in 1280 (1873) the defendant

¹ I. L. R. 5 Cal. 256.

was said to have withdrawn the grant and had refused to make any allowance to the plaintiffs. The defendant contended *inter alia* that the plaintiff not being sons, but grandsons of the Raja, were entitled to nothing more than what the Raja for the time being chose to give them, and that it was at his option to give or to withhold any allowance at all. In the course of his judgment Tottenham, J., observed as follows :—" The question for decision in this suit and which the lower court has decided in the plaintiff's favour is whether members of the family other than the son or sons of a Raja are of right entitled to such maintenance.*** It is undisputed that the eldest son being, by the family custom, entitled to the exclusive possession of the Raj all his brothers are entitled to be maintained out of the estate, and of course they are so entitled during their whole life-time, though the Raj may in the meantime devolve upon a new Raja who would also have to maintain his own brother as well as those of his predecessor. We can find no invariable or certain custom that any one below the first generation from the last Raja can claim maintenance as of right." His Lordship dismissed the suit with costs.

Thus we reach a stage when the ordinary law having failed to be of any avail to this class of persons custom came to be invoked in their favour. For as observed by Lord Dunedin in *Ramma Rao vs. Raja of Pittapur*,¹ " In the absence of special custom, the grandsons of a deceased Zemindar are not entitled to maintenance out of the impartible estate in the hands of his successor. This follows from the fact that in an impartible Zemindary there is no coparcenary.... The view taken in the Madras court prior to the cases above cited² that there was joint property in an impartible zemindary which only fell short of coparcenary because by custom there was no right to parti-

¹ I. L. R. 41 Mad. 778 (P.C.).

² I. L. R. 10 All. 272 (*Sartaj vs. Deoraj*); 26 I.A. 83 (*Venkata vs. Court of Wards*); I. L. R. 29 Bom. 51 (*Bechoo vs. Monkarb*).

tion is no longer tenable.. The right of sons to maintenance in an impartible zemindary has been so often recognised that it is not necessary in each case to prove a custom. There are other persons entitled to maintenance either by reason of their exclusion from the possession owing to personal disqualifications, or by reason of personal relationship to one of the line of zemindars, but the latter class does not include grandsons.*** In the present case no special custom had been proved or even alleged and the claim was not based on personal relationship which includes widow, parent, infant child—it does not include grandson."

It is amply evident that in considering the position of the members, other than the holder of an impartible estate, the question of the origin of impartibility has always been left out of consideration. The only justification for this seems to be that after a custom has come into existence our courts of law are only concerned with the custom and not with the process of its development. Considering the origin of the custom of impartibility, it might reasonably have been expected that a parallel custom would develop giving all the junior branches a claim to maintenance. But if in this respect custom have been otherwise, it is not for the courts of law to rectify it. In one respect our courts of law seem to have given an opinion consistent with the history of the growth of impartibility. They are correct when they say that only those can claim maintenance who might have claimed partition had the estate been partible.

You will remember that before Sartaj Kuari's case co-parcenary in impartible estates was generally assumed¹ and you will see from the above that the junior members were declared to have a right of maintenance apart from any question of relationship with the last holder. In Sartaj Kuari *vs.* Deoraj Kuari² however, such co-parcenary was found inconsistent

¹ Except in the Tipperah case.

² 15 I.A. 51 = 10 All. 272; see also the Pittapur case, 26 I.A. 63.

with the very nature of the estate, and if any co-ownership in the junior members be impossible, surely these can scarcely claim maintenance unless, as we have seen, they are so related to the holder as would give them such a claim against *him* personally. Exactly this is what we find decided in cases coming after Sartaj Kuari's case. In the second Pittapur case,¹ for example, it was held that apart from custom and certain relationship to the holder of an impartible estate, the junior members of the family have no right to maintenance out of it. "The right to maintenance, so far as founded on or inseparable from the right to co-parcenary begins where co-parcenary begins, and ceases where co-parcenary ceases." "An impartible zemindary is the creature of custom and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person, who, if the zemindary were not impartible, would be entitled as of right to maintenance."

Then again in *Vikram Deo vs. Vikram Deo*,² their Lordships re-iterated the same view that apart from *custom* and certain near relationships to the holder a junior member would have no claim to maintenance.

But Baijnath Pershad *vs.* Tej Bali³ has again intimated the possibility of co-parcenary in impartible estates and has sought to limit the operation of Sartaj Kuari's case and the Pittapur case to the question of alienation only and not to succession. Logically such a position would give junior members again a legal right of maintenance. They have an ownership in the estate, though at present dormant, and that is sufficient for their claim. Lord Dunedin felt this and so in his attempt at distinguishing the second Pittapur case he observed: "It must be remembered that the claim for maintenance as put

¹ Ram Rao *vs.* Raja of Pittapur: 45 I.A. 148.

² The Joy Pur case: 24 C.W.N. 226 (P.C.)=31 C.L.J. 91.

³ 33 C.L.J. 388 (P.C.)=25 C.W.N. 564 (P.C.)=48 I.A. 195.

forward was made not against the head of the family, to which the claimant was member, but against the donee who on the claimant's own allegations was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observation which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*.¹ The decision, therefore, was the logical outcome of the decision in the Sartaj Kuari's case."

We shall not multiply examples. If Baijnath Pershad's case have correctly decided that co-parcenary in impartible estate does exist, the logical outcome of the decision might have been that claim to maintenance is a legal right of the co-parceners or the junior members of the family.¹ But the case

¹ See judgment of Sir N. R. Chatterjee in Jharia Raj Appeal F.A. 194 of 1921 (unreported) Calcutta, where his Lordship referred to and reviewed also the following cases :—

=42 C.L.J. 280.

Where maintenance claim upheld :—

(i) Udayar Palayam case ; 24 Mad. 562 on appeal 28 Mad. 508 (P.C.).

(ii) Himmat Singh *vs.* Ganapat Singh : 12 Bom. H.C.R. 94.

(iii) Ram Chandra *vs.* Sakhrum ; 2 Bom. 346.

Claim to maintenance under custom :—

(i) Baijnath *vs.* Tej Bali : 45 I.A. 148.

(ii) Yarlagadda *vs.* Yarlagadda : 27 I.A. 151 (157).

(iii) 5 Cal. 259.

(iv) Rao Kishore Singh *vs.* Gahanbai : 24 C.W.N. 601 (P.C.).

(v) Pratap Chandra Deo Dhabal *vs.* Jagadish Chandra Dhabal : 40 C.L.J. 331.

Receiving maintenance how far proofs of jointness :—

(i) Mohesh Chandra Dhal *vs.* Satrugan Dhal : 29 Cal. 343=29 I.A. 62.

has been understood as not deciding any such thing. The Judicial Committee by its full board decision in *Sri Pratap Chandra Deo Dhabal Deb vs. Raja Jagadish Chandra Deo Dhabal Deb*¹ declared that there is no co-parcenary in an impartible estate and that what Baijnath Pershad's case decided was not that there was any co-parcenary in the correct sense of the term in an impartible estate, but that in finding out the successor of the present holder the rule will be to assume as if the property were a co-parcenary property of an ordinary Mitakshara family.

From what has been said about the cases on junior members' right it is amply clear that our courts of law have not always approached the question from the right point. In order to correctly appreciate such rights it is absolutely necessary to find out the nature of the impartible estate itself, to examine whether it is impartible because originally it was an office, or whether it has become impartible by custom though originally a partible property. These enquiries are indeed always pertinent in such cases, and it is really unfortunate that these have never been considered. No doubt if the rules determining the claims of junior members can be said to have been well-recognised, it does not signify much what the reasons for them are; and a searching for reasons for these rules may then appear useless to a practical lawyer. But law in this respect can hardly be said to be "well-recognized rules which have existed from time immemorial," and even Lord Esher² would not have

(ii) *Harapal Singh vs. Lokhraj Kunwar* : 30 All. 406.

On appeal 39 I.A. 10 (*Thakurani Lokhraj Kunwar vs. Thakur Harapal*).

(iii) *Protap Ch. vs. Jagadish Ch.* : 40 C.L.J. 331.

(iv) *Tara Kumari vs. Chatirbhuj* : 42 I.A. 192.

(v) *Rameswar Baksh vs. Arjun Singh* : 28 I.A. 1=23 All. 194.

(vi) *Beni Prosad Keeri vs. Dinanath Roy* : 26 I.A. 216=27 Cal 396.
46 C.L.J. 136 (P.C.).

² Lord Esher in "*Mexborough vs. Whitley Council*," L. R. (1897)

found fault with any searching for reasons in these cases. The law as it is has no doubt at all times seemed a vast enough task, for mastery and for practice, without any speculation upon its ultimate foundations and horizons ; yet one cannot but commend the attitude that demands that every existing thing be explained by some reason for its existence. Even if this serves no other purpose it would at least gratify the noble instinct of scientific curiosity to understand why we maintain what now is.

2 Q. B. 115, remarked : " There has been a great searching for reasons for these rules. But it does not signify what the reasons for them are, if they are well-recognized rules which have existed from time immemorial."

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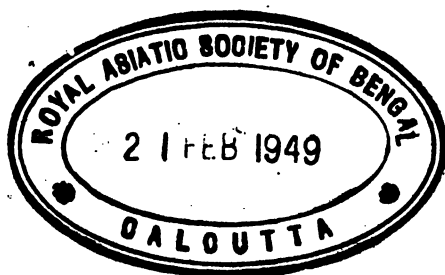
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